United Nations

Report of the International Law Commission

Sixty-eighth session
(2 May-10 June and 4 July-12 August 2016)

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United Nations • New York, 2016

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A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2016*.

ISSN 0251-822X

Summary of contents

Chapter *Page*

I. Introduction 1

II. Summary of the work of the Commission at its sixty-eighth session 6

III. Specific issues on which comments would be of particular interest to the Commission 10

IV. Protection of persons in the event of disasters 12

V. Identification of customary international law 74

VI. Subsequent agreements and subsequent practice in relation to the interpretation of treaties 118

VII. Crimes against humanity 241

VIII. Protection of the atmosphere 281

IX. *Jus cogens* 297

X. Protection of the environment in relation to armed conflicts 306

XI. Immunity of State officials from foreign criminal jurisdiction 341

XII. Provisional application of treaties 364

XIII. Other decisions and conclusions of the Commission 376

Contents

Chapter *Page*

I. Introduction 1
  A. Membership 1
  B. Officers and the Enlarged Bureau 2
  C. Drafting Committee 2
  D. Working Groups 4
  E. Secretariat 4
  F. Agenda 4
II. Summary of the work of the Commission at its sixty-eighth session 6
III. Specific issues on which comments would be of particular interest to the Commission 10
  A. Immunity of State officials from foreign criminal jurisdiction 10
  B. New topics 10
IV. Protection of persons in the event of disasters 12
  A. Introduction 12
  B. Consideration of the topic at the present session 12
  C. Recommendation of the Commission 13
  D. Tribute to the Special Rapporteur 13
  E. Text of the draft articles on the protection of persons in the event of disasters 13
    1. Text of the draft articles 13
    2. Text of the draft articles with commentaries thereto 17
      Article 1 Scope 18
        Commentary 18
      Article 2 Purpose 19
        Commentary 20
      Article 3 Use of terms 21
        Commentary 22
      Article 4 Human dignity 28
        Commentary 28
      Article 5 Human rights 31
        Commentary 31
      Article 6 Humanitarian principles 33
        Commentary 33
      Article 7 Duty to cooperate 36
        Commentary 36

Article 8 Forms of cooperation in the response to disasters 39

Commentary 39

Article 9 Reduction of the risk of disasters.. 42

Commentary 42

Article 10 Role of the affected State.. 50

Commentary 51

Article 11 Duty of the affected State to seek external assistance 53

Commentary 53

Article 12 Offers of external assistance 56

Commentary 57

Article 13 Consent of the affected State to external assistance 59

Commentary 59

Article 14 Conditions on the provision of external assistance................................ 63

Commentary 63

Article 15 Facilitation of external assistance 65

Commentary 66

Article 16 Protection of relief personnel, equipment and goods............................ 67

Commentary 68

Article 17 Termination of external assistance 70

Commentary 70

Article 18 Relationship to other rules of international law 72

Commentary 72

V. Identification of customary international law... 74

A. Introduction 74

B. Consideration of the topic at the present session 74

C. Text of the draft conclusions on identification of customary international law adopted by the Commission... 76

1. Text of the draft conclusions 76

2. Text of the draft conclusions and commentaries thereto 79

General commentary 79

Part One
Introduction

Conclusion 1 Scope 80

Commentary 81

Part Two
Basic approach

Conclusion 2 Two constituent elements 82

	Commentary	82
Conclusion 3	Assessment of evidence for the two constituent elements	84
	Commentary	84

Part Three
A general practice

Conclusion 4	Requirement of practice	87
	Commentary	88
Conclusion 5	Conduct of the State as State practice	90
	Commentary	90
Conclusion 6	Forms of practice	91
	Commentary	91
Conclusion 7	Assessing a State's practice	92
	Commentary	93
Conclusion 8	The practice must be general	94
	Commentary	94

Part Four
Accepted as law (*opinio juris*)

Conclusion 9	Requirement of acceptance as law (*opinio juris*)	97
	Commentary	97
Conclusion 10	Forms of evidence of acceptance as law (*opinio juris*)	99
	Commentary	99

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11	Treaties	102
	Commentary	102
Conclusion 12	Resolutions of international organizations and intergovernmental conferences	106
	Commentary	106
Conclusion 13	Decisions of courts and tribunals	109
	Commentary	109
Conclusion 14	Teachings	111
	Commentary	111

Part Six
Persistent objector

Conclusion 15	Persistent objector	112
	Commentary	112

Part Seven
Particular customary international law

Conclusion 16 Particular customary international law 114

Commentary 115

VI. Subsequent agreements and subsequent practice in relation to the interpretation of treaties 118

A. Introduction 118

B. Consideration of the topic at the present session 119

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission 120

1. Text of the draft conclusions 120

2. Text of the draft conclusions and commentaries thereto 123

Part One
Introduction

Conclusion 1 [1a] Introduction 124

Commentary 124

Part Two
Basic rules and definitions

Conclusion 2 [1] General rule and means of treaty interpretation 124

Commentary 125

Conclusion 3 [2] Subsequent agreements and subsequent practice as authentic means of interpretation 132

Commentary 132

Conclusion 4 Definition of subsequent agreement and subsequent practice 137

Commentary 137

Conclusion 5 Attribution of subsequent practice 149

Commentary 149

Part Three
General aspects

Conclusion 6 Identification of subsequent agreements and subsequent practice 156

Commentary 156

Conclusion 7 Possible effects of subsequent agreements and subsequent practice in interpretation 165

Commentary 165

Conclusion 8 [3] Interpretation of treaty terms as capable of evolving over time 180

Commentary 180

Conclusion 9 [8] Weight of subsequent agreements and subsequent practice as a means of interpretation 188
Commentary.......... 188
Conclusion 10 [9] Agreement of the parties regarding the interpretation of a treaty 193
Commentary.......... 193

Part Four
Specific aspects

Conclusion 11 [10] Decisions adopted within the framework of a Conference of States Parties.......... 201
Commentary.......... 202
Conclusion 12 [11] Constituent instruments of international organizations.......... 213
Commentary.......... 214
Conclusion 13 [12] Pronouncements of expert treaty bodies 228
Commentary.......... 229

VII. Crimes against humanity.......... 241
A. Introduction 241
B. Consideration of the topic at the present session 241
C. Text of the draft articles on crimes against humanity provisionally adopted so far by the Commission.......... 242
1. Text of the draft articles 242
2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session.......... 246
Article 5 Criminalization under national law.......... 247
Commentary 248
Article 6 Establishment of national jurisdiction 265
Commentary 266
Article 7 Investigation 269
Commentary 269
Article 8 Preliminary measures when an alleged offender is present 271
Commentary 271
Article 9 *Aut dedere aut judicare* 273
Commentary 273
Article 10 Fair treatment of the alleged offender.......... 276
Commentary 276

VIII. Protection of the atmosphere.......... 281
A. Introduction 281
B. Consideration of the topic at the present session 281

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission 282
1. Text of the draft guidelines, together with preambular paragraphs 282
2. Text of the draft guidelines, together with a preambular paragraph, and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session 284
Preamble 285
Commentary 285
Guideline 3 Obligation to protect the atmosphere 286
Commentary 286
Guideline 4 Environmental impact assessment 288
Commentary 289
Guideline 5 Sustainable utilization of the atmosphere 291
Commentary 291
Guideline 6 Equitable and reasonable utilization of the atmosphere 292
Commentary 293
Guideline 7 Intentional large-scale modification of the atmosphere 293
Commentary 293
IX. *Jus cogens* 297
A. Introduction 297
B. Consideration of the topic at the present session 297
1. Introduction by the Special Rapporteur of the first report 297
2. Summary of the debate 300
3. Concluding remarks of the Special Rapporteur 304
X. Protection of the environment in relation to armed conflicts 306
A. Introduction 306
B. Consideration of the topic at the present session 306
1. Introduction by the Special Rapporteur of the third report 309
2 Summary of the debate 311
(a) General comments 311
(b) Draft principle I-1 — Implementation and enforcement 312
(c) Draft principle I-3 — Status of forces and status of mission agreements 313
(d) Draft principle I-4 — Peace operations 313
(e) Draft principle III-1 — Peace agreements 313
(f) Draft principle III-2 — Post-conflict environmental assessments and reviews 314

(g) Draft principle III-3 — Remnants of war, and
Draft principle III-4 — Remnants of war at sea 314

(h) Draft principle III-5 — Access to and sharing of information 315

(i) Draft principle IV-1 — Rights of indigenous peoples 316

(j) Future programme of work 316

3. Concluding remarks of the Special Rapporteur 317

C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission 319

1. Text of the draft principles 319

2. Text of the draft principles and commentaries thereto provisionally adopted321 by the Commission at its sixty-eighth session 321

Introduction 321

Draft principle 1 Scope 322

Commentary 322

Draft principle 2 Purpose 322

Commentary 323

Part One
General principles 323

Draft principle 5 [I-(x)] Designation of protected zones 323

Commentary 323

Part Two
Principles applicable during armed conflict 327

Draft principle 9 [II-1] General protection of the natural environment during armed conflict 327

Commentary 328

Draft principle 10 [II-2] Application of the law of armed conflict to the natural environment 332

Commentary 332

Draft principle 11 [II-3] Environmental considerations 335

Commentary 335

Draft principle 12 [II-4] Prohibition of reprisals 336

Commentary 336

Draft principle 13 [II-5] Protected zones 339

Commentary 339

XI. Immunity of State officials from foreign criminal jurisdiction 341

A. Introduction 341

B. Consideration of the topic at the present session 342

1. Introduction by the Special Rapporteur of the fifth report 342

2. Summary of the debate 345
  (a) General comments 345
  (b) Comments on methodological and conceptual issues raised in the fifth report 345
  (c) Comments on draft article 7 350
  (d) Future work 351
C. Text of the draft articles on immunity of State officials from foreign criminal352 jurisdiction provisionally adopted so far by the Commission 352
1. Text of the draft articles 352
2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session 353
  Article 2 Definitions 353
  Commentary 353
  Article 6 Scope of immunity *ratione materiae* 359
  Commentary 359
XII. Provisional application of treaties 364
A. Introduction 364
B. Consideration of the topic at the present session 365
1. Introduction by the Special Rapporteur of the fourth report 366
2. Summary of the debate 368
  (a) General comments 368
  (b) Reservations 369
  (c) Invalidity of treaties 370
  (d) Termination or suspension of the operation of a treaty as a consequence of its breach 371
  (e) Cases of succession of States, State responsibility and outbreak of hostilities 372
  (f) Draft guideline 10 372
  (g) Practice of international organizations in relation to application of treaties 372
  (h) Future work 373
3. Concluding remarks of the Special Rapporteur 373
XIII. Other decisions and conclusions of the Commission 376
A. Requests by the Commission for the Secretariat to prepare studies on two topics in the Commission's agenda 376
B. Programme, procedures and working methods of the Commission and its documentation 376
1. Working Group on the Long-term Programme of Work 376

2. Consideration of General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels 378
3. Consideration of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015 on the Report of the International Law Commission on the work of the sixty-seventh session 379
4. Seventieth anniversary session of the International Law Commission 380
5. Honoraria 381
6. Documentation and publications 381
7. *Yearbook of the International Law Commission* 382
8. Assistance of the Codification Division 382
9. Websites 383
10. United Nations Audiovisual Library of International Law 383
C. Date and place of the sixty-ninth session of the Commission 383
D. Cooperation with other bodies 383
E. Representation at the seventy-first session of the General Assembly 384
F. International Law Seminar 384

Annexes

A. The settlement of international disputes to which international organizations are parties 387
B. Succession of States in respect of State responsibility 400

Chapter I
Introduction

1. The International Law Commission held the first part of its sixty-eighth session from 2 May to 10 June 2016 and the second part from 4 July to 12 August 2016 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Narinder Singh, Chairperson of the sixty-seventh session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Mohammed Bello Adoke (Nigeria)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Lucius Caflisch (Switzerland)
Mr. Enrique J.A. Candioti (Argentina)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Abdelrazeg El-Murtadi Suleiman Gouider (Libya)
Ms. Concepción Escobar Hernández (Spain)
Mr. Mathias Forteau (France)
Mr. Juan Manuel Gómez-Robledo (Mexico)
Mr. Hussein A. Hassouna (Egypt)
Mr. Mahmoud D. Hmoud (Jordan)
Mr. Huikang Huang (People's Republic of China)
Ms. Marie G. Jacobsson (Sweden)
Mr. Maurice Kamto (Cameroon)
Mr. Kriangsak Kittichaisaree (Thailand)
Mr. Roman A. Kolodkin (Russian Federation)
Mr. Ahmed Laraba (Algeria)
Mr. Donald M. McRae (Canada)
Mr. Shinya Murase (Japan)
Mr. Sean D. Murphy (United States of America)
Mr. Bernd H. Niehaus (Costa Rica)
Mr. Georg Nolte (Germany)
Mr. Ki Gab Park (Republic of Korea)
Mr. Chris Maina Peter (United Republic of Tanzania)
Mr. Ernest Petrič (Slovenia)
Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland)

B. Officers and the Enlarged Bureau

3. At its 3291st meeting, on 2 May 2016, the Commission elected the following officers:

Chairperson:	Mr. Pedro Comissário Afonso (Mozambique)
First Vice-Chairperson:	Mr. Georg Nolte (Germany)
Second Vice-Chairperson:	Mr. Gilberto Vergne Saboia (Brazil)
Chairperson of the Drafting Committee:	Mr. Pavel Šturma (Czech Republic)
Rapporteur:	Mr. Ki Gab Park (Republic of Korea)

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairpersons of the Commission[1] and the Special Rapporteurs.[2]

5. The Commission set up a Planning Group composed of the following members: Mr. Georg Nolte (Chairperson), Mr. Lucius Caflisch, Mr. Pedro Comissário Afonso, Mr. Abdelrazeg El-Murtadi Suleiman Gouider, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Ms. Marie G. Jacobsson, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Ahmed Laraba, Mr. Donald M. McRae, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Bernd H. Niehaus, Mr. Ernest Petrič, Mr. Pavel Sturma, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Mr. Amos S. Wako, Mr. Nugroho Wisnumurti, Sir Michael Wood, and Mr. Ki Gab Park (*ex officio*).

C. Drafting Committee

6. At its 3295th, 3302nd, 3304th, 3307th, 3311th, 3315th and 3322nd meetings, on 10, 20, 25 and 31 May and on 7 June, and on 5 and 18 July 2016, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

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[1] Mr. Lucius Caflisch, Mr. Enrique Candioti, Mr. Maurice Kamto, Mr. Bernd H. Niehaus, Mr. Ernest Petrič, Mr. Narinder Singh and Mr. Nugroho Wisnumurti.

[2] Ms. Concepción Escobar Hernández, Mr. Juan Manuel Gómez-Robledo, Ms. Marie G. Jacobsson, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Georg Nolte, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina and Sir Michael Wood.

(a) *Protection of persons in the event of disasters*: Mr. Pavel Šturma (Chairperson), Mr. Eduardo Valencia-Ospina (Special Rapporteur), Mr. Mathias Forteau, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Sean D. Murphy, Mr. Georg Nolte, Mr. Ernest Petrič, Mr. Gilberto Vergne Saboia, Mr. Narinder Singh, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Ki Gab Park (*ex officio*).

(b) *Crimes against humanity*: Mr. Pavel Šturma (Chairperson), Mr. Sean D. Murphy (Special Rapporteur), Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Mahmoud D. Hmoud, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Ernest Petrič, Mr. Gilberto Vergne Saboia, Mr. Narinder Singh, Mr. Marcelo Vázquez-Bermúdez, Mr. Amos S. Wako, Sir Michael Wood, and Mr. Ki Gab Park (*ex officio*).

(c) *Identification of customary international law*: Mr. Pavel Šturma (Chairperson), Sir Michael Wood (Special Rapporteur), Mr. Pedro Comissário Afonso, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Mahmoud D. Hmoud, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Georg Nolte, Mr. Ernest Petrič, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez and Mr. Ki Gab Park (*ex officio*).

(d) *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*: Mr. Pavel Šturma (Chairperson), Mr. Georg Nolte (Special Rapporteur), Mr. Mahmoud D. Hmoud, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Sean D. Murphy, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, and Mr. Ki Gab Park (*ex officio*).

(e) *Protection of the atmosphere*: Mr. Pavel Šturma (Chairperson), Mr. Shinya Murase (Special Rapporteur), Mr. Mathias Forteau, Mr. Mahmoud D. Hmoud, Mr. Kriangsak Kittichaisaree, Mr. Donald M. McRae, Mr. Sean D. Murphy, Mr. Bernd H. Niehaus, Mr. Gilberto Vergne Saboia, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Ki Gab Park (*ex officio*).

(f) *Provisional application of treaties*: Mr. Pavel Šturma (Chairperson), Mr. Juan Manuel Gómez-Robledo (Special Rapporteur), Mr. Mathias Forteau, Mr. Maurice Kamto, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Georg Nolte, Mr. Ernest Petrič, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Ki Gab Park (*ex officio*).

(g) Jus cogens: Mr. Pavel Šturma (Chairperson), Mr. Dire D. Tladi (Special Rapporteur), Mr. Enrique J.A. Candioti, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Mahmoud D. Hmoud, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Georg Nolte, Mr. Ernest Petrič, Mr. Gilberto Vergne Saboia, Mr. Narinder Singh, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Ki Gab Park (*ex officio*).

(h) *Protection of the environment in relation to armed conflicts*: Mr. Pavel Šturma (Chairperson), Ms. Marie G. Jacobsson (Special Rapporteur), Ms. Concepción Escobar Hernández, Mr. Mahmoud D. Hmoud, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Ki Gab Park (*ex officio*).

7. The Drafting Committee held a total of 51 meetings on the eight topics indicated above.

D. Working Groups

8. At its 3291st meeting on 2 May 2016, the Commission established a *Working Group on Identification of customary international law*: Mr. Marcelo Vázquez-Bermúdez (Chairperson), Sir Michael Wood (Special Rapporteur), Mr. Pedro Comissário Afonso, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Mahmoud D. Hmoud, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Donald M. McRae, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Ernest Petrič, Mr. Pavel Šturma and Mr. Ki Gab Park (*ex officio*).

9. The Planning Group reconstituted the *Working Group on the Long-term Programme of work*: Mr. Donald M. McRae (Chairperson), Mr. Lucius Caflisch, Mr. Abdelrazeg El-Murtadi Suleiman Gouider, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Mr. Maurice Kamto, Mr. Kriangsak Kittichaisaree, Mr. Roman A. Kolodkin, Mr. Ahmed Laraba, Mr. Shinya Murase, Mr. Georg Nolte, Mr. Ernest Petrič, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Amos S. Wako, Mr. Nugroho Wisnumurti, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Ki Gab Park (*ex officio*).

E. Secretariat

10. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto, Principal Legal Officer, served as Principal Assistant Secretary. Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary. Ms. Patricia Georget, Ms. Hanna Dreifeldt-Lainé and Mr. David Nanopoulos, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

11. At its 3291st meeting, on 2 May 2016, the Commission adopted an agenda for its sixty-eighth session consisting of the following items:

1. Organization of the work of the session.
2. Protection of persons in the event of disasters.
3. Immunity of State officials from foreign criminal jurisdiction.
4. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
5. Provisional application of treaties.
6. Identification of customary international law.
7. Protection of the environment in relation to armed conflicts.
8. Protection of the atmosphere.
9. Crimes against humanity.
10. *Jus cogens.*
11. Programme, procedures and working methods of the Commission and its documentation.

12. **Date and place of the sixty-ninth session.**

13. **Cooperation with other bodies.**

14. **Other business.**

Chapter II
Summary of the work of the Commission at its sixty-eighth session

12. With regard to the topic "**Protection of persons in the event of disasters**", the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697) surveying the comments made by States and international organizations, and other entities, on the draft articles on the protection of persons in the event of disasters adopted on first reading at the sixty-sixth session (2014) and making recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments and international organizations (A/CN.4/696 and Add.1) on the draft articles adopted on first reading.

13. The Commission subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto, on the protection of persons in the event of disaster, and in accordance with article 23 of its statute recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters (chap. IV).

14. With respect to the topic "**Identification of customary international law**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695 and Add.1), which contained, in particular, suggestions for the amendments of several draft conclusions in light of the comments by Governments. It also addressed ways and means to make the evidence of customary international law more readily available. Finally, it provided a bibliography on the topic. In addition, the Commission had before it the memorandum by the Secretariat concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

15. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 16 draft conclusions, together with commentaries thereto, on identification of customary international law. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018 (chap. V).

16. With respect to the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/694), which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts. The report also discussed the structure and scope of the draft conclusions.

17. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 13 draft conclusions, together with commentaries thereto, on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018 (chap. VI).

18. With respect to the topic "**Crimes against humanity**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/690), as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms

which may be of relevance to the future work of the International Law Commission (A/CN.4/698). The second report addressed, *inter alia*, criminalization under national law, establishment of national jurisdiction, general investigation and cooperation for identifying alleged offenders, exercise of national jurisdiction when an alleged offender is present, *aut dedere aut judicare* and fair treatment of an alleged offender.

19. Following the debate in Plenary, the Commission decided to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee (A/CN.4/L.873), the Commission provisionally adopted draft articles 5 to 10, together with commentaries thereto. The Commission also decided to refer to the Drafting Committee the question of the liability of legal persons. Following its consideration of a further report of the Drafting Committee (A/CN.4/L.873/Add.1), the Commission provisionally adopted paragraph 7 of draft article 5, together with the commentary thereto (chap. VII).

20. Concerning the topic "**Protection of the atmosphere**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/692), which, building upon the previous two reports, analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, five draft guidelines were proposed on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere, and geoengineering, together with an additional preambular paragraph.

21. Following the debate in the Commission, which was preceded by a dialogue with scientists organized by the Special Rapporteur, the Commission decided to refer the five draft guidelines, together with the preambular paragraph, as contained in the Special Rapporteur's third report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee (A/CN.4/L.875), the Commission provisionally adopted draft guidelines 3, 4, 5, 6 and 7 and a preambular paragraph, together with commentaries thereto (chap. VIII).

22. With regard to the topic "***Jus cogens***", the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), which addressed conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in international law of the elements central to the concept of peremptory norms of global international law. The report further raised a number of methodological issues on which the Commission was invited to comment, and reviewed the debates held in the Sixth Committee in 2014 and 2015. The Commission subsequently decided to refer draft conclusions 1 and 3, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft conclusions 1 and 2 provisionally adopted by the Committee, which was submitted to the Commission for information (chap. IX).

23. With respect to the topic "**Protection of the environment in relation to armed conflicts**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples. Following the debate in Plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting

Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.876), and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons (A/CN.4/L.870/Rev.1) by the Drafting Committee at the present session, together with commentaries thereto (chap. X).

24. Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/701), which analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Since at the time of its consideration the report was only available to the Commission in two of the six official languages of the United Nations, the debate in the Commission was commenced, involving members wishing to comment on the fifth report at the sixty-eighth session, and would be continued at the sixty-ninth session of the Commission.

25. Upon its consideration of the report of the Drafting Committee on work done previously and taken note of by the Commission during its sixty-seventh session (A/CN.4/L.865), the Commission provisionally adopted draft articles 2 (f) and 6, together with commentaries thereto (chap. XI).

26. With regard to the topic "**Provisional application of treaties**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/699 and Add.1), which continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention and of the practice of international organizations with regard to provisional application. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. The addendum to the report contained examples of recent European Union practice on provisional application of agreements with third States.

27. Following the debate in Plenary, the Commission decided to refer draft guideline 10, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.877), and took note of draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee during the sixty-seventh and sixty-eighth sessions. Draft guideline 5 on unilateral declarations had been kept in abeyance by the Drafting Committee to be returned to at a later stage (chap. XII).

28. As regards "**Other decisions and conclusions of the Commission**", the Commission decided to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement and another memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto (chap. XIII, sect. A).

29. The Commission also established a Planning Group to consider its programme, procedures and working methods (chap. XIII, sect. B). The Commission decided to include in its long-term programme of work the topics: (a) The settlement of international disputes to which international organizations are parties; and (b) Succession of States in respect of State responsibility (chap. XIII, sect. B).

30. The Commission recommended that it holds the first part of its seventieth session in New York, and requested the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate this. The Commission recommended that a

seventieth anniversary commemorative event be held during its seventieth session in 2018. The commemorative event would be held in two parts, the first during the first part of its seventieth session recommended to be held in New York, and the second during the second part of its seventieth session in Geneva (chap. XIII, sect. B).

31. The Commission continued its exchange of information with the International Court of Justice, the Inter-American Juridical Committee, and the Committee of Legal Advisers on Public International Law of the Council of Europe. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (chap. XIII, sect. D).

32. The Commission decided that its sixty-ninth session be held in Geneva from 1 May to 2 June and 3 July to 4 August 2017 (chap. XIII, sect. C).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

33. The Commission considers as still relevant the requests for information contained in Chapter III of the report of its sixty-sixth session (2014) on the topics "Crimes against humanity"[3] and the "Protection of the atmosphere"[4], as well as at its sixty-seventh session (2015) on the topics "Provisional application of treaties"[5], and "*Jus cogens*",[6] and would welcome any additional information.

34. The Commission would welcome any information on the issues mentioned in the paragraph above as well as the following issues, by 31 January 2017, in order for it to be taken into account in the respective reports of the Special Rapporteurs.

A. Immunity of State officials from foreign criminal jurisdiction

35. The Commission would appreciate being provided by States with information on their national legislation and practice, including judicial and executive practice, with reference to the following issues:

(a) the invocation of immunity;

(b) waivers of immunity;

(c) the stage at which the national authorities take immunity into consideration (investigation, indictment, prosecution);

(d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered;

(e) the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered.

B. New topics

36. The Commission decided to include in its long-term programme of work two new topics, namely (a) Settlement of international disputes to which international organizations are parties; and (b) Succession of States in respect of State responsibility. In the selection of these topics, the Commission was guided by the following criteria that it had agreed upon at its fiftieth session (1998), namely that the topic (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in

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[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 34.

[4] *Ibid.*, para. 27.

[5] *Ibid.*, *Seventieth Session, Supplement No. 10* (A/70/10), para. 30.

[6] *Ibid.*, para. 31.

international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on these new topics.

37. In addition, the Commission would welcome any proposals that States may wish to make concerning possible topics for inclusion in its long-term programme of work. It would be helpful if such proposals were accompanied by a statement of reasons in their support, taking into account the criteria, referred to above, for the selection of topics.

Chapter IV
Protection of persons in the event of disasters

A. Introduction

38. At its fifty-ninth session (2007), the Commission decided to include the topic "Protection of persons in the event of disasters" in its programme of work and to appoint Mr. Eduardo Valencia Ospina as Special Rapporteur for the topic.[7] In paragraph 7 of its resolution 62/66 of 6 December 2007, the General Assembly took note of the decision of the Commission to include the topic in its programme of work.

39. From its sixtieth (2008) to sixty-sixth sessions (2014), the Commission considered the topic on the basis of seven successive reports submitted by the Special Rapporteur.[8] The Commission also had before it a memorandum by the Secretariat[9] and a set of written replies submitted by the Office for the Coordination of Humanitarian Affairs and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.[10]

40. At its sixty-sixth session (2014), the Commission adopted, on first reading, a set of 21 draft articles on the protection of persons in the event of disasters, together with commentaries thereto.[11] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies for comments and observations.[12]

B. Consideration of the topic at the present session

41. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697), as well as comments and observations received from Governments, international organizations and other entities (A/CN.4/696 and Add.1).

42. The Commission considered the eighth report of the Special Rapporteur at its 3291st to 3296th meetings from 2 to 11 May 2016. At its 3296th meeting, held on 11 May 2016, the Commission referred the draft preamble, proposed by the Special Rapporteur in his eighth report, and draft articles 1 to 21 to the Drafting Committee, with the instruction that the Drafting Committee commence the second reading of the draft articles taking into

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[7] *Yearbook ... 2007*, vol. II (Part Two), para. 375. At its fifty-eighth session (2006), the Commission endorsed the recommendation of the Planning Group to include, *inter alia*, the topic "Protection of persons in the event of disasters" in the long-term programme of work of the Commission. A brief syllabus on the topic, prepared by the secretariat, was annexed to the report of the Commission in 2006 (*Yearbook ... 2006*, vol. II (Part Two), annex III). In its resolution 61/34 of 4 December 2006, the General Assembly took note of the inclusion of the topic in the long-term programme of work of the Commission.

[8] See A/CN.4/598 (preliminary report), A/CN.4/615 and Corr.1 (second report), A/CN.4/629 (third report), A/CN.4/643 and Corr.1 (fourth report), A/CN.4/652 (fifth report), A/CN.4/662 (sixth report) and A/CN.4/668 and Corr.1 and Add.1 (seventh report).

[9] A/CN.4/590 and Add.1 to 3.

[10] *Yearbook ... 2008*, vol. II (Part Two), paras. 32-33.

[11] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 55-56.

[12] *Ibid.*, paras. 51-53.

account the comments of Governments, international organizations and other entities, the proposals of the Special Rapporteur and the debate in the plenary on the Special Rapporteur's eighth report.

43. The Commission considered the report of the Drafting Committee (A/CN.4/L.871) at its 3310th meeting, held on 3 June 2016, and adopted the entire set of draft articles on the protection of persons in the event of disasters, on second reading, at the same meeting (sect. E.1 below).

44. At its 3332nd to 3335th meetings, from 2 to 4 August 2016, the Commission adopted the commentaries to the aforementioned draft articles (sect. E.2 below).

45. In accordance with its statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

46. At its 3335th meeting, held on 4 August 2016, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters.

D. Tribute to the Special Rapporteur

47. At its 3335th meeting, held on 4 August 2016, the Commission, after adopting the draft articles on the protection of persons in the event of disasters, adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> "*Having adopted* the draft articles on the protection of persons in the event of disasters,
>
> "*Expresses* to the Special Rapporteur, Mr. Eduardo Valencia Ospina, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the protection of persons in the event of disasters."

E. Text of the draft articles on the protection of persons in the event of disasters

1. Text of the draft articles

48. The text of the draft articles adopted by the Commission, on second reading, at its sixty-eighth session is reproduced below.

Protection of persons in the event of disasters

Bearing in mind Article 13, paragraph 1 (*a*), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Considering the frequency and severity of natural and human-made disasters and their short-term and long-term damaging impact, *Fully aware* of the essential needs of persons affected by disasters, and conscious that the rights of those persons must be respected in such circumstances,

Mindful of the fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster,

Stressing the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance,

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2
Purpose

The purpose of the present draft articles is to facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.

Article 3
Use of terms

For the purposes of the present draft articles:

(a) "disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society;

(b) "affected State" means a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place;

(c) "assisting State" means a State providing assistance to an affected State with its consent;

(d) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;

(e) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by an assisting State or other assisting actor for disaster relief assistance;

(f) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance;

(g) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment, and other objects for disaster relief assistance.

Article 4
Human dignity

The inherent dignity of the human person shall be respected and protected in the event of disasters.

Article 5
Human rights

Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.

Article 6
Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7
Duty to cooperate

In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

Article 8
Forms of cooperation in the response to disasters

Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Article 9
Reduction of the risk of disasters

1. Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Article 10
Role of the affected State

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

Article 11
Duty of the affected State to seek external assistance

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

Article 12
Offers of external assistance

1. In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.

2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply.

Article 13
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

Article 14
Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 15
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding:

(a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 16
Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance.

Article 17
Termination of external assistance

The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination.

Article 18
Relationship to other rules of international law

1. The present draft articles are without prejudice to other applicable rules of international law.

2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

2. Text of the draft articles and commentaries thereto

49. The text of the draft preamble and the draft articles, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

Protection of persons in the event of disasters

…

***Bearing in mind* Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,**

***Considering* the frequency and severity of natural and human-made disasters and their short-term and long-term damaging impact,**

***Fully aware* of the essential needs of persons affected by disasters, and conscious that the rights of those persons must be respected in such circumstances,**

***Mindful* of the fundamental value of solidarity in international relations and the importance of strengthening international cooperation in respect of all phases of a disaster,**

***Stressing* the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance,**

…

Commentary

(1) The preamble aims at providing a conceptual framework for the draft articles, setting out the general context in which the topic of the protection of persons in the event of disasters has been elaborated and furnishing the essential rationale for the text.

(2) The first preambular paragraph focuses on the mandate given to the General Assembly, under Article 13, paragraph 1 (a), of the Charter of the United Nations, to encourage the progressive development of international law and its codification and on the consequential object of the International Law Commission, as provided in article 1 of its statute. It restates similar wording included in recent final drafts of the Commission containing a preamble.[13] It also serves, at the outset, to highlight the fact that the draft

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[13] See the articles on prevention of transboundary harm from hazardous activities, General Assembly resolution 62/68 of 6 December 2007, annex, and for the commentary thereto, *Yearbook ... 2001*, vol. II (Part Two), chap. V, sect. E; and the articles on the law of transboundary aquifers, General Assembly resolution 63/124 of 11 December 2008, and for the commentaries thereto, *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

articles contain elements of both progressive development and codification of international law.

(3) The second preambular paragraph calls attention to the frequency and severity of natural and human-made disasters, and their damaging impact, which have raised the concern of the international community, leading to the formulation by the Commission of legal rules. The reference to "natural and human-made disasters" emphasizes a distinctive characteristic of the draft articles when compared with other similar instruments, which have a more restricted scope by being limited to natural disasters. On the contrary, disasters often arise from complex sets of causes. Furthermore, the draft articles are intended to cover the various stages of the disaster cycle, focusing on response and disaster risk reduction. The reference to "short-term and long-term impact" is intended to show that the focus of the draft articles is not just on the immediate effects of a disaster. It also implies a far-reaching approach, addressing activities devoted to the recovery phase.

(4) The third preambular paragraph addresses the essential needs of the persons whose lives, well-being and property have been affected by disasters, and reiterates that the rights of those persons must be respected in such circumstances as provided for by the draft articles.

(5) The fourth preambular paragraph recalls the fundamental value of solidarity in international relations, and the importance of strengthening international cooperation in respect of all phases of a disaster, both of which are key concepts underlying the topic and which cannot be interpreted as diminishing the sovereignty of affected States and their prerogatives within the limits of international law. Mention of "all phases of disasters" recognizes the reach of the articles into each component phase of the entire disaster cycle, as appropriate.

(6) The final preambular paragraph stresses the principle of the sovereignty of States, and reaffirms the primary role of the affected State in the provision of disaster relief assistance, which is a core element of the draft articles. The reference to sovereignty, and the primary role of the affected State, provides the background against which the entire set of draft articles is to be understood.

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Commentary

(1) Draft article 1 establishes the scope of the draft articles and tracks the formulation of the title of the topic. It sets the orientation of the draft articles as being primarily focused on the protection of persons whose life, well-being and property are affected by disasters. Accordingly, as established in draft article 2, the focus is on facilitating a response to disasters, as well as reducing the risk of disasters, so as to adequately and effectively meet the essential needs of the persons concerned, while fully respecting their rights.

(2) The draft articles cover, *ratione materiae*, the rights and obligations of States affected by a disaster in respect of persons present in their territory (irrespective of nationality) or in territory under their jurisdiction or control, and the rights and obligations of third States and intergovernmental organizations and non-governmental organizations and other entities in a position to cooperate, particularly in the provision of disaster relief assistance as well as in the reduction of disaster risk. Such rights and obligations are understood to apply on two axes: the rights and obligations of States in relation to one another and the rights and obligations of States in relation to persons in need of protection.

While the focus is on the former, the draft articles also contemplate, albeit in general terms, the rights of individuals affected by disasters, as established by international law. The importance of human rights protections in disaster situations is demonstrated by the increased attention paid to the issue by human rights bodies established under the auspices of the United Nations, as well as by regional international courts. Furthermore, as is elaborated in draft article 3, the draft articles are not limited to any particular type of disaster. A distinction between natural and human-made disasters would be artificial and difficult to sustain in practice in view of the complex interaction of different causes leading to disasters.

(3) The scope *ratione personae* of the draft articles is limited to natural persons affected by disasters. In addition, the focus is primarily on the activities of States and intergovernmental organizations, including regional integration organizations, and other entities enjoying specific international legal competence in the provision of disaster relief assistance in the context of disasters. The activities of non-governmental organizations and other private actors, sometimes collectively referred to as "civil society" actors, are included within the scope of the draft articles only in a secondary manner, either as direct beneficiaries of duties placed on States (for example, of the duty of States to cooperate, in draft article 7) or indirectly, as being subject to the domestic laws implementing the draft articles of the affected State, a third State or the State of nationality of the entity or private actor. Except where specifically indicated otherwise, the draft articles cover international disaster response by both international and domestic actors. The draft articles do not, however, cover other types of international assistance, such as assistance provided by States to their nationals abroad and consular assistance.

(4) As suggested by the phrase "in the event of" in the title of the topic, the scope of the draft articles *ratione temporis* is primarily focused on the immediate post-disaster response and early recovery phase, including the post-disaster reconstruction phase. Nonetheless, as confirmed by draft article 2, the pre-disaster phase falls within the scope of the draft articles, and is the subject of draft article 9, which deals with disaster risk reduction and disaster prevention and mitigation activities.

(5) The draft articles are not limited, *ratione loci*, to activities in the area where the disaster occurs, but also cover those within assisting States and transit States. Nor is the transboundary nature of a disaster a necessary condition for the triggering of the application of the draft articles. Certainly, it is not uncommon for major disasters to have a transboundary effect, thereby increasing the need for international cooperation and coordination. Nonetheless, examples abound of major international relief assistance efforts being undertaken in response to disasters occurring solely within the territorial boundaries of a single State, or within a territory under its jurisdiction or control. In the event of a disaster, States have the duty to protect all persons present in their territory, or in territory under their jurisdiction or control, irrespective not only of nationality but also of legal status. While different considerations may arise, unless otherwise specified, the draft articles are not tailored with any specific disaster type or situation in mind, but are intended to be applied flexibly to meet the needs arising from all disasters, regardless of their transboundary effect.

Article 2
Purpose

The purpose of the present draft articles is to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights.

Commentary

(1) Draft article 2 elaborates on draft article 1 (Scope) by providing further guidance on the purpose of the draft articles. The main issue raised relates to the juxtaposition of "needs" versus "rights". The Commission was aware of the debate in the humanitarian assistance community on whether a "rights-based" approach as opposed to the more traditional "needs-based" approach was to be preferred, or vice versa. The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary. The Commission settled for a formulation that emphasized the importance of the response to a disaster, and the reduction of the risk of disasters, that adequately and effectively meets the "needs" of the persons concerned. Such response, or reduction of risk, has to take place with full respect for the rights of such persons.

(2) Although not necessarily a term of art, by "adequate and effective", what is meant is a high-quality response or reduction of the risk of disasters, so as to meet the essential needs of the persons affected by the disaster. Similar formulations are to be found in existing agreements, in the context of the response to disasters. These include "effective and concerted" and "rapid and effective" found in the 2015 Agreement on Disaster Management and Emergency Response of the Association of Southeast Asian Nations (hereinafter, "ASEAN Agreement"),[14] as well as "proper and effective" used in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998 (hereinafter, "Tampere Convention").[15] Given the context in which such response is to be provided, an element of timeliness is implicit in the term "effective". The more drawn-out the response, the less likely it is that it will be effective. This and other aspects of what makes a response "adequate" and "effective" is the subject of other provisions of the draft articles, including draft article 15. Notwithstanding this, it is understood that while a high standard is called for, it has, nonetheless, to be based in what is realistic and feasible "on the ground" in any given disaster situation. Hence, no reference is made, for example, to the response having to be "fully" effective.

(3) While the main emphasis of the draft articles is on the response to disasters, the dimension of disaster risk reduction also falls within their scope and is the subject of draft article 9. In doing so, the draft articles acknowledge the general recognition, within the international community (most recently evidenced by the Sendai Framework for Disaster Risk Reduction, 2015-2030, adopted in 2015),[16] of the essential role of disaster risk reduction. The reference to "adequate and effective" action so as to "meet the essential needs of the persons concerned, with full respect for their rights", accordingly, applies equally to disaster response and disaster risk reduction.

(4) The Commission decided not to formulate the provision in the form of a general statement on the obligation of States, as it was felt that it would not sufficiently highlight the specific rights and obligations of the affected State. It was not clear, for example, whether such a formulation would sufficiently distinguish between different obligations for different States, such as for the affected State as opposed to assisting States. Accordingly, a reference to States was not included, on the understanding that it was not strictly necessary for a provision on the purpose of the draft articles. The obligations of States are specifically considered in other provisions of the draft articles.

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[14] *ASEAN Document Series 2005*, p. 157.

[15] United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5.

[16] The Sendai Framework for Disaster Risk Reduction 2015-2030, adopted by the Third United Nations World Conference on Disaster Risk Reduction, and endorsed by the General Assembly in its resolution 69/283 of 3 June 2015, annex II.

(5) The word "facilitate" reflects the vision of the Commission for the role that the draft articles might play in the overall panoply of instruments and arrangements that exist at the international level in the context of disaster relief assistance, as well as disaster risk reduction. It was felt that while the draft articles could not by themselves ensure a response, or the reduction of risk, they were intended to facilitate an adequate and effective response or reduction of risk.

(6) The qualifier "essential" before the term "needs" was included in order to indicate more clearly that the needs being referred to are those related to survival or similarly basic needs in the aftermath of a disaster. It was felt that "essential" clearly brought out the context in which such needs arise. Such reference should be further understood in the context of the importance of taking into account the needs of the particularly vulnerable, as indicated in draft article 6.

(7) By "persons concerned" what is meant are people directly affected by the disaster, including by being displaced thereby, as opposed to individuals more indirectly affected. This term was inserted so as to qualify the scope of the draft articles and is in conformity with the approach taken by existing instruments, which focus on the provision of relief to persons directly affected by a disaster. This is not to say that individuals who are more indirectly affected, for example, through loss of family members in a disaster or who suffered economic loss owing to a disaster elsewhere, would be without remedy or recourse. Indeed, it is not the intention of the Commission to state the legal rules applicable to such individuals in the draft articles. The inclusion within the scope of the draft articles of disaster risk reduction implies that the "persons concerned" would cover those likely to be affected by a future disaster, a determination to be made at the national level based on an evaluation of the persons' exposure and vulnerability.

(8) The reference to "with full respect for their rights" aims at ensuring that the rights in question be respected and protected, as confirmed, in the context of human rights, by draft article 5. In addition, the phrase intentionally leaves the question of how rights are to be enforced to the relevant rules of international law themselves. While the draft articles primarily envisage the application of human rights, which is the subject of draft article 5, the reference to "rights" is not only a reference to human rights, but also, *inter alia*, to rights acquired under domestic law.

Article 3
Use of terms

For the purposes of the present draft articles:

(a) "disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society;

(b) "affected State" means a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place;

(c) "assisting State" means a State providing assistance to an affected State with its consent;

(d) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;

(e) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by an assisting State or other assisting actor for disaster relief assistance;

(f) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance;

(g) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment, and other objects for disaster relief assistance.

Commentary

(1) The Commission's practice, as reflected in most of the draft articles adopted on diverse topics of international law, has been to include a provision on the "use of terms". Some of the terms selected for inclusion in draft article 3 were specifically singled out in the commentaries to various draft articles as requiring definition. Other terms were included because of their overall frequency of occurrence in the draft articles.

Subparagraph (a)

(2) Subparagraph (a) defines the term "disaster" solely for the purposes of the draft articles. The definition has been delimited so as to properly capture the scope of the draft articles, as established in draft article 1, while not, for example, inadvertently also dealing with other serious events, such as political and economic crises, which may also undermine the functioning of society, but which are outside the scope of the draft articles. Such delimitation is evident from two features of the definition: (a) the emphasis placed on the existence of a calamitous event that causes serious disruption of the functioning of society; and (b) the inclusion of a number of qualifying phrases.

(3) The Commission considered the approach of the Tampere Convention, which conceptualized a disaster as being the consequence of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to being the event itself. The Commission was aware that such an approach represented contemporary thinking in the humanitarian assistance community, as confirmed, notably, by the 2005 World Conference on Disaster Reduction, convened by the United Nations at Hyogo in Japan, as well as by recent treaties and other instruments, including the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the International Federation of Red Cross and Red Crescent Societies (IFRC) (hereinafter, "IFRC Guidelines").[17] Nonetheless, the Commission decided to shift the emphasis back to the earlier conception of "disaster" as being a specific event, since it was embarking on the formulation of a legal instrument, which required a more concise and precise legal definition, as opposed to one that is more policy oriented.

(4) The element requiring the existence of an event is qualified in several ways. First, the reference to a "calamitous" event serves to establish a threshold, by reference to the nature of the event, whereby only extreme events are covered. This was inspired by the definition embodied in the resolution on humanitarian assistance adopted by the Institute of International Law at its 2003 Bruges session,[18] which deliberately established a higher threshold so as to exclude other acute crises. What constitutes "calamitous" is to be understood both by application of the qualifier in the remainder of the provision, namely "… resulting in widespread loss of life, great human suffering and distress, mass

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[17] International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2007).

[18] Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 263.

displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society"; and by keeping in mind the scope and purpose of the draft articles, as articulated in draft articles 1 and 2. In addition, reference is made to "event or series of events" in order to cover those types of events, such as frequent small-scale disasters, that, on their own, might not meet the necessary threshold, but that, taken together would constitute a calamitous event for the purposes of the draft articles. No limitation is included concerning the origin of the event, that is whether it is natural or human-made, in recognition of the fact that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities. Likewise, the draft articles apply equally to sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or sea-level rise), as well as frequent small-scale events (floods or landslides).

(5) The event is further qualified by two causation requirements. First, for the event, or series of events, to be considered "calamitous" in the sense required by the draft articles, it has to result in one or more of four possible outcomes: widespread loss of life, great human suffering and distress, mass displacement or large-scale material or environmental damage. Accordingly, a major event such as a serious earthquake, which takes place in the middle of the ocean or in an uninhabited area and which does not result in at least one of the four envisaged outcomes, would not satisfy the threshold requirement in subparagraph (a). Second, the nature of the event is further qualified by the requirement that any, or all, of the four possible outcomes, as applicable, result in the serious disruption of the functioning of society. In other words, an event that resulted in, for example, large-scale material damage, but did not seriously disrupt the functioning of society, would not, accordingly, satisfy the threshold requirement. Hence, by including such causal elements, the definition retains aspects of the approach taken in contemporary texts, as exemplified by the Tampere Convention, namely by considering the consequence of the event as a key aspect of the definition, albeit for purposes of establishing the threshold for the application of the draft articles.

(6) The element of "widespread loss of life" is a refinement, inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief.[19] The requirement of "widespread" loss of life serves to exclude events that result in relatively low loss of life; it being borne in mind that such events could nonetheless satisfy one of the other causal requirements. Conversely, an event causing widespread loss of life could, on its own, satisfy the causation requirement and could result in the triggering of the application of the draft articles if it resulted in the serious disruption of the functioning of society.

(7) The possibility of "great human suffering and distress" was included out of recognition that many major disasters are accompanied by widespread loss of life or by great human suffering and distress, including that occasioned by non-fatal injuries, disease or other health problems caused by the disaster. Accordingly, cases where an event has resulted in relatively localized loss of life, owing to adequate prevention and preparation, as well as effective mitigation actions, but nonetheless has caused severe dislocation resulting in great human suffering and distress that seriously disrupt the functioning of society, would be covered by the draft articles.

(8) Similarly, "mass displacement" refers to one of the other consequences of major disasters, namely the displacement of persons on a large scale. Together with "great human suffering and distress", displacement by the onset of a disaster is one of the two most common ways in which persons are considered "affected" by the disaster. Displacement

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[19] *International Review of the Red Cross*, vol. 36 (1996), No. 310, annex VI.

affects persons through the loss of access to livelihoods, social services and social fabric. In complying with their obligations set forth in the draft articles, States should also take into account the displacement dimension. The qualifier "mass" was included to align with the high threshold for the application of the draft articles.

(9) "Large-scale material or environmental damage" was included by the Commission in recognition of the wide-scale damage to property, livelihoods and economic, physical, social and cultural assets, as well as the environment typically caused by major disasters and the resultant disruption of the functioning of society arising from the severe setback for human development and well-being that such a loss typically causes. It is to be understood that it is not the environmental or property loss *per se* that would be covered by the draft articles, but rather the impact on persons of such loss; thus avoiding a consideration of economic loss in general. A requirement of economic loss might unnecessarily limit the scope of the draft articles, by, for example, precluding them from also dealing with activities designed to mitigate potential future human loss arising from existing environmental damage.

(10) As already alluded to, the requirement of serious disruption of the functioning of society serves to establish a high threshold that would exclude from the scope of the draft articles other types of crises such as serious political or economic crises. Moreover, differences in application can be further borne out by the purpose of the draft articles, as established in draft article 2, and by the fact that the type of protection required, and rights involved, may be different, and are, to varying extents, regulated by other rules of international law, in particular international humanitarian law, as indicated in draft article 18. A situation of armed conflict cannot be qualified *per se* as a disaster for the purposes of the present draft articles. The requirement of serious disruption necessarily also implies the potential for such disruption. This means that the fact that a State took appropriate disaster risk reduction measures or relief measures, in accordance with established emergency plans in response to a disaster with the potential to seriously disrupt the functioning of society, would not *per se* exclude the application of the draft articles.

(11) While the four possible outcomes envisaged provide some guidance on what might amount to a serious disruption of the functioning of society, the Commission refrained from providing further descriptive or qualifying elements, so as to leave some discretion in practice.

(12) The definition of "disaster", for purposes of the draft articles, is subject to the specification in draft article 18, paragraph 2, that the draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

Subparagraph (b)

(13) Subparagraph (b), which defines the term "affected State" for purposes of the draft articles, is inspired by the definition of the same term provided in the IFRC Guidelines.[20] It reflects the basic orientation that the draft articles are primarily addressed to States. It also anticipates the centrality of the role to be played by the State affected by the disaster, as established in draft article 10.

(14) The key feature in disaster response or disaster risk reduction is State control. In most cases that would accord with control exercised by the State upon whose territory the disaster occurs. However, this does not necessarily exclude other situations in which a State may exercise *de jure* jurisdiction, or *de facto* control, over another territory in which a

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[20] See IFRC Guidelines (footnote 17 above), guideline 2, para. 8 ("the State upon whose territory persons or property are affected by a disaster").

disaster occurs. The phrase "in whose territory, or in territory under whose jurisdiction or control" was inspired by the definition of "State of origin" in draft article 2, subparagraph (d), of the 2001 articles on prevention of transboundary harm from hazardous activities.[21]

(15) The Commission considered that a State exercising jurisdiction or control over a territory (other than its own) in which a disaster occurs would also be deemed an "affected State" for purposes of the draft articles. Such possibility is also implicit in the recognition, in article 18, that the draft articles would apply in the context of so-called "complex disasters", which occur in the same territory where an armed conflict is taking place, to the extent that the response to the disaster in question is not governed by the rules of international humanitarian law. At the same time, the provision was intentionally formulated to make the territorial link clear. As such, the reference to "jurisdiction" is not intended to include States of nationality that may claim jurisdiction under international law over individual persons affected by a disaster that occurs outside their territory, or territory under their jurisdiction or control. The Commission recognized that the implication of including States exercising jurisdiction or control was that, in exceptional cases, there may be two affected States: the State upon whose territory the disaster occurs and the State exercising jurisdiction or control over the same territory.

(16) The concluding phrase "a disaster takes place" is intended to align the definition of "affected State" with that of "disaster", in subparagraph (a). It seeks to strike a balance between the option of placing the emphasis on the effects of a disaster, thereby increasing the number of States that could potentially be considered "affected States", as opposed to that of focusing on the territorial component (where the event took place), which could unnecessarily exclude States that suffer the consequences of the disaster even though the event did not, strictly speaking, take place in their territory (or territory under their jurisdiction or control). Accordingly, an explicit *renvoi* to the definition of "disaster", in subparagraph (a), is made in recognition of the fact that the draft articles provide for a composite definition of disaster, covering both the event and its effects, and implying that different States may be considered "affected", for purposes of the draft articles, in different scenarios. It also accords with the Commission's approach of considering the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles.[22]

Subparagraph (c)

(17) The definition of "assisting State" in subparagraph (c) is drawn from the definition of "supporting State" in the 2000 Framework Convention on Civil Defence Assistance,[23] with the term "Beneficiary State" changed to "affected State", which is the term utilized in the draft articles and defined in subparagraph (b). The phrase "a State providing assistance" is a reference to the concept of "external assistance", which is defined in subparagraph (e), and which is undertaken on the basis of the duty to cooperate in draft article 7, read together with draft articles 8 and 9.

(18) A State is only categorized as an "assisting State" once the assistance is being or has been provided. In other words, a State offering assistance is not an "assisting State", with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been consented to by the affected State, in accordance with draft article 13.

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[21] General Assembly resolution 62/68 of 6 December 2007, annex, art. 2; for the commentary thereto, see *Yearbook ... 2001*, chap. V, sect. E.

[22] See above, para. (4) of the commentary to draft art. 3.

[23] United Nations, *Treaty Series*, vol. 2172, No. 38131, p. 213, art. 1 (f).

Subparagraph (d)

(19) In addition to affected and assisting States, the draft articles also seek to regulate the position of other assisting actors. A significant proportion of contemporary disaster risk reduction and disaster relief activities are undertaken by, or under the auspices of, international organizations, including but not limited to the United Nations, as well as non-governmental organizations and other entities. This group of actors is collectively referred to in the draft articles as "other assisting actors". This reference is without prejudice to the differing legal status of these actors under international law, which is acknowledged in the draft articles, for example, in draft article 12.[24]

(20) The definition reflects the commentary to draft article 7, which confirms the understanding that the term "assisting actors" refers to, in the formulation employed in draft article 7, the United Nations, the components of the Red Cross and Red Crescent Movement, and other assisting actors.[25] The phrase "or entity", which is drawn, in part, from the ASEAN Agreement,[26] was added in recognition of the fact that not all actors that are involved in disaster relief efforts can be categorized in one or the other category mentioned. In particular, that phrase is to be understood as referring to entities such as the Red Cross and Red Crescent Movement.

(21) The Commission understood the definition of "other assisting actors" as being limited, for purposes of the draft articles, to those that are external to the affected State.[27] Accordingly, the activities of domestic non-governmental organizations, for example, are not covered. Nor would a domestic actor incidentally fall within the scope of the draft articles through the act of securing, or attempting to secure, assistance from abroad.

(22) As with the definition of "assisting State", in subparagraph (c), the concluding phrase "providing assistance to that State with its consent" is a reference to the central role played by consent in the draft articles, in accordance with draft article 13. It is also included in recognition of the broad range of activities typically undertaken by the entities in question, in the context of both disaster risk reduction and the provision of disaster relief assistance, and which are regulated by the draft articles.

Subparagraph (e)

(23) Subparagraph (e) defines the type of assistance that the draft articles envisage assisting States or other assisting actors providing to the affected State, as a form of cooperation anticipated in draft article 8.

(24) The formulation is based on both the Guidelines on The Use of Foreign Military and Civil Defence Assets in Disaster Relief (also known as the "Oslo Guidelines")[28] and the 2000 Framework Convention on Civil Defence Assistance.[29] The reference to "material" in the Oslo Guidelines was replaced with "equipment and goods", which is the term used in the draft articles, and which is defined in subparagraph (g).

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[24] See below para. (4) of the commentary to draft art. 12.

[25] See below para. (1) of the commentary to draft art. 7. See also the IFRC Guidelines (footnote 17 above), guideline 2.14 (definition of "assisting actor").

[26] Art. 1, para. 1 (definition of "assisting entity").

[27] See below para. (2) of the commentary to draft art. 14

[28] OCHA, *Guidelines on The Use of Foreign Military and Civil Defence Assets in Disaster Relief* ("Oslo Guidelines") of 2006, as revised on 1 November 2007.

[29] See art. 1 (d) (definition of "assistance").

(25) The phrase "provided to an affected State by an assisting State or other assisting actor" reiterates the nature of the legal relationship between the assisting State or actor and the affected State, as envisaged in the draft articles.

(26) The concluding clause seeks to clarify the purpose for which external assistance ought to be provided, namely "for disaster relief assistance". The Commission understood that the concept of "external assistance", by definition, applied specifically to the response phase. While the formulation is cast in the technical terminology of disaster response, it is understood to accord with the relevant part of the overall purpose of the draft articles, as set out in draft article 2, namely to "facilitate the adequate and effective response to disasters … so as to meet the essential needs of the persons concerned, with full respect for their rights".

Subparagraph (f)

(27) The subparagraph defines the personnel component of external assistance provided by assisting States or by other assisting actors. The definition indicates the two types of personnel who are typically sent for the purpose of providing disaster relief assistance, namely "civilian" or "military" personnel.[30] The reference to the latter category was also inspired by the bilateral treaty between Greece and the Russian Federation of 2000,[31] and is intended as recognition of the important role played by military personnel, as a category of relief personnel, in the provision of disaster relief assistance. While the reference to military personnel is more pertinent to the case of assisting States, the term "civilian" personnel is meant to be broad enough to cover such personnel sent by assisting States and other assisting actors. That these are options open to some, but not all, assisting entities (including States) is confirmed by the use of the phrase in the alternative ("or").

(28) It is understood that such personnel are typically "specialized" personnel, as referred to in the annex to General Assembly resolution 46/182 of 19 December 1991, in that what is expected are personnel who have the necessary skill set and are provided with the necessary equipment and goods, as defined in subparagraph (g), to perform the functions in question.

(29) The phrase "sent by" establishes a nexus between the assisting actor, whether a State or other actor, and the personnel concerned. The Commission decided against making a reference to "acting on behalf of" in order not to prejudge any question related to the application of the rules of international law on the attribution of conduct to States or international organizations,[32] given the primary role of the affected State as provided for in draft article 10, paragraph 2.

Subparagraph (g)

(30) As indicated in subparagraph (e), "equipment" and "goods" are a key component of the kind of external assistance being envisaged in the draft articles. The formulation is

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[30] See the Oslo Guidelines (footnote 28 above), guideline 5.

[31] Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in the Field of Prevention and Response to Natural and Man-Made Disasters, of 21 February 2000, art. 1 (definition of "team for providing assistance").

[32] See articles on the responsibility of States for internationally wrongful acts, 2001, General Assembly resolution 56/83 of 12 December 2001, annex, arts. 4-9 (for the commentary thereto, see *Yearbook … 2001*, vol. II (Part Two), and corrigendum, chap. IV, sect. E), and articles on the responsibility of international organizations, 2011, General Assembly resolution 66/100 of 9 December 2011, annex, arts. 6-7 (for the commentary thereto, see *Yearbook … 2001*, vol. II (Part Two), and corrigendum, chap. V, sect. E).

drawn from the commentary to draft article 15,[33] as well as the resolution on humanitarian assistance of the Institute of International Law.[34] The list covers the types of material generally accepted to be necessary for the provision of disaster relief assistance. That the list is not exhaustive is confirmed by the reference to "other objects".

(31) Generally speaking, two types of material are envisaged: the technical "equipment" required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they require to provide relief, such as supplies, physical and electronic tools, machines and telecommunications equipment; and "goods" that are necessary for the survival and fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking water, medical supplies, means of shelter, clothing and bedding. Search dogs are specifically anticipated in the phrase "specially trained animals", which is drawn from Specific Annex J of the International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention").[35] The Commission considered the definition to be sufficiently flexible also to include services that might be provided by relief personnel.

Article 4
Human dignity

The inherent dignity of the human person shall be respected and protected in the event of disasters.

Commentary

(1) Draft article 4 addresses the principle of human dignity in the context of both disaster response and disaster risk reduction. Human dignity is the core principle that informs and underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle for any action to be taken in the context of the provision of relief assistance, in disaster risk reduction and in the ongoing evolution of applicable laws. The Commission considered the centrality of the principle to the protection of persons in the event of disasters as sufficient justification for the inclusion of "human dignity" in a separate, autonomous provision in the body of the draft articles.

(2) The principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. Reaffirmation of "the dignity and worth of the human person" is found in the preamble to the Charter of the United Nations, while the preamble to the 1948 Universal Declaration of Human Rights[36] declares "recognition of the inherent dignity … of all members of the human family is the foundation of freedom, justice and peace in the world". Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,[37] the International Covenant on Economic, Social and Cultural Rights,[38]

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[33] See below, para. (5) of the commentary to draft art. 15.

[34] See footnote 18 above.

[35] United Nations, *Treaty Series*, vol. 950, No. 13561, p. 269, as revised by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 26 June 1999, United Nations, *Treaty Series*, vol. 2370, No. 13561, p. 27 (definition of "relief consignments").

[36] General Assembly resolution 217 (III) (A) of 10 December 1948.

[37] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, preambular paragraphs and art. 10, para. 1.

[38] *Ibid.*, vol. 993, No. 14531, p. 3, preambular paragraphs and art. 13, para. 1.

the International Convention on the Elimination of all Forms of Racial Discrimination,[39] the Convention on the Elimination of All Forms of Discrimination against Women,[40] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[41] the Convention on the Rights of the Child[42] and the Convention on Rights of Persons with Disabilities.[43] The principle is also central to the field of international humanitarian law. The concept of personal dignity is recognized in common article 3, paragraph 1 (c), of the Geneva Conventions for the protection of war victims (hereinafter "1949 Geneva Conventions"),[44] articles 75 and 85 of Protocol I[45] and article 4 of Protocol II.[46]

(3) The concept of human dignity also lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The IFRC Guidelines state that: "Assisting actors and their personnel should … respect the human dignity of disaster-affected persons at all times."[47] The General Assembly, in its resolution 45/100 14 December 1990, holds that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[48] The Institute of International Law likewise was of the view that a failure to provide humanitarian assistance to those affected by disasters constitutes "an offence to human dignity".[49]

(4) The precise formulation of the principle adopted by the Commission, namely the "inherent dignity of the human person", is drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights, and article 10, paragraph 1, of the

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[39] *Ibid.*, vol. 660, No. 9464, p. 195, preambular paragraphs.

[40] *Ibid.*, vol. 1249, No. 20378, p. 13, preambular paragraphs.

[41] *Ibid.*, vol. 1465, No. 24841, p. 85, preambular paragraphs.

[42] *Ibid.*, vol. 1577, No. 27531, p. 3, preambular paragraphs; art. 23, para. 1; art. 28, para. 2; art. 37; and arts. 39-40.

[43] *Ibid.*, vol. 2515, No. 44910, p. 3, art. 3.

[44] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 ("Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 ("Geneva Convention III"); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 ("Geneva Convention IV"), common art. 3, para. 1 (noting the prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment")

[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 75, para. 2 (b) (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault"); art. 85, para. 4 (c) (noting that when committed wilfully and in violation of the Conventions or the Protocol, "practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" are regarded as grave breaches of the Protocol).

[46] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *ibid.*, No. 17513, p. 609, art. 4, para. 2 (e) (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault").

[47] IFRC Guidelines (see footnote 17 above), guideline 4, para. 1.

[48] Preambular paragraph.

[49] Resolution on humanitarian assistance (see footnote 18 above), art. II, para. 1.

International Covenant on Civil and Political Rights. This formulation has also been adopted in instruments such as the Convention on the Rights of the Child,[50] and the American Convention on Human Rights.[51]

(5) The provision does not give an express indication of the actors being addressed. It could be considered that it applies only to States, but not necessarily to "other assisting actors", given that different legal approaches exist as to non-State entities owing legal obligations, under international law, to protect the human dignity of an affected person. Nonetheless, the provision should be understood as applying to assisting States and those assisting actors (as understood under draft article 3) capable of acquiring legal obligations under international law. The Commission recognizes the role played both by affected States and assisting States in disaster response and risk reduction activities (which are the subject of draft articles 9 to 16). Much of the activity in the field of disaster response, and to a certain extent in that of disaster risk reduction, occurs through organs of intergovernmental organizations, non-governmental organizations and other non-State entities such as IFRC.[52]

(6) The phrase "respected and protected" accords with contemporary doctrine and jurisprudence in international human rights law. The formula is used in a number of instruments that relate to disaster relief, including the Oslo Guidelines,[53] the Mohonk Criteria,[54] the Guiding Principles on Internal Displacement,[55] and the Guiding Principles on the Right to Humanitarian Assistance.[56] In conjunction, the terms "respect" and "protect" connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity. By way of example, the duty to protect may require States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity. The Commission considered that an obligation to "protect" should be commensurate with the legal obligations borne by the respective actors addressed in the provision. An affected State therefore holds the primary role in the protection of human dignity, by virtue of its primary role in the direction, control, coordination and supervision of disaster relief assistance, as reflected in draft article 10, paragraph 2. Furthermore, each State shall be guided by the imperative to respect and protect the inherent dignity of the human person when taking measures to reduce the risk of disasters, as contemplated in draft article 9.

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[50] See art. 37 (c) (noting, *inter alia*, that: "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person").

[51] United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 5, para. 2 (noting, *inter alia*, that: "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person").

[52] See *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), annex C, para. 28.

[53] Oslo Guidelines (see footnote 28 above), para. 20 (noting that: "The dignity and rights of all victims must be respected and protected").

[54] J. M. Ebersole, "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance" ("Mohonk Criteria"), *Human Rights Quarterly*, vol. 17, No. 1 (February 1995), pp. 192-208, p. 196 ("noting that: "The dignity and rights of all victims must be respected and protected").

[55] E/CN.4/1998/53/Add.2, annex, principle 26 (noting, *inter alia*, that: "Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected").

[56] Adopted by the Council of the International Institute of Humanitarian Law in April 1993, principle 10 (noting that: "Humanitarian assistance can, if appropriate, be made available by way of 'humanitarian corridors' which should be respected and protected by competent authorities of the parties involved and if necessary by the United Nations authority").

(7) The generic reference at the end of the provision to "in the event of disasters", which is the same formulation used in draft article 1, reflects the general scope of the draft articles, which includes disaster risk reduction.

Article 5
Human rights

Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.

Commentary

(1) Draft article 5 reflects the broad entitlement to human rights protection held by those persons affected by disasters. It also serves as a reminder of the duty of States to ensure compliance with all relevant human rights obligations applicable both during the disaster and the pre-disaster phase. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 4, reinforced by the close proximity of the two draft articles.

(2) The general reference to "human rights" encompasses human rights obligations expressed in relevant international agreements and those in customary international law. Best practices for the protection of human rights included in non-binding texts at the international level, including, *inter alia*, the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters,[57] as well as the Guiding Principles on Internal Displacement,[58] serve to contextualize the application of existing human rights obligations to the specific situation of disasters. Protection under national law (such as that provided in the constitutional law of many States) is also envisaged. The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to or qualify those obligations.

(3) As clarified in the commentary to draft article 1, at paragraph (3), the scope *ratione personae* of the draft articles covers the activities of States and international organizations, including regional integration organizations, and other entities enjoying specific international legal competence in the provision of disaster relief assistance. The Commission recognizes that the scope and content of an obligation to protect the human rights of those persons affected by disasters will vary considerably among those actors. The neutral phrasing adopted by the Commission should be read in light of an understanding that distinct obligations will be held by affected States, assisting States and various other assisting actors, respectively.

(4) The draft article recognizes the entitlement of affected persons to "the respect for and protection of" their human rights, which continue to apply in the context of disasters. The phrase tracks that found in draft article 4, on human dignity, thereby further confirming the linkage between the two provisions. The reference to the concept of "protection", commonly found in existing international instruments for the protection of human rights, is intended, together with "respect", as a holistic formula describing the nature and extent of the obligations upon States, and is to be read in light of the reference to "full respect for their rights" in draft article 2. Hence, States' obligations are not restricted to avoiding interference with people's rights ("respect"), but may extend, as required by the rules in

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[57] Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (Washington, D.C., Brookings-Bern Project on Internal Displacement, 2011).

[58] See footnote 55 above.

question, to "protection"[59] of their rights by, *inter alia*, adopting a number of measures varying from passive non-interference to active ensuring of the satisfaction of individual needs, all depending on the concrete circumstances. In light of the scope of the draft articles, set out in draft article 2, such measures also extend to the prevention and avoidance of conditions that might lead to the violation of human rights.[60]

(5) The Commission did not consider it feasible to draw up an exhaustive list of all potentially applicable rights and was concerned that such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable.

(6) A particularly relevant right is the right to life, as recognized in article 6, paragraph 1, of the International Covenant on Civil and Political Rights if a State is refusing to adopt positive measures to prevent or respond to disasters that cause loss of life.[61] It was also understood that some of the relevant rights are economic and social rights, which States parties to the Covenant on Economic, Social and Cultural Rights, and other applicable conventions, have an obligation to realize progressively, including those which provide minimum core obligations (in relation to the provision of essential foodstuffs, essential health care, basic shelter and housing and education for children) and which continue even in the context of a disaster. Other applicable rights include, *inter alia*, the right to receive humanitarian assistance; the rights of particularly vulnerable groups (as anticipated in draft article 6) to have their special protection and assistance needs taken into account; the right of communities to have a voice in the planning and execution of risk reduction, response and recovery initiatives; and the right of all persons displaced by disasters to non-discriminatory assistance in obtaining durable solutions to their displacement. References to specific rights are also to be found in some of the commentaries to other draft articles.[62]

(7) The draft article intentionally leaves open the question of how rights are to be enforced to the relevant rules of international law themselves. It is understood that there is often an implied degree of discretion in the application of rights, conditioned by the severity of the disaster, depending on the relevant rules recognizing or establishing the rights in question. Furthermore, the Commission considered that the reference to "human rights" incorporates both the rights and limitations that exist in the sphere of international human rights law. The reference to "human rights" is, accordingly, to the whole of international human rights law, including in particular its treatment of derogable and non-derogable rights. As such, the provision contemplates an affected State's right of suspension or derogation where recognized under existing international agreements, which is also confirmed by the concluding phrase "in accordance with international law".

(8) The concluding reference to "in accordance with international law" also serves to recall that there may be other rules of international law, such as those dealing with refugees and internally displaced persons, which may have a bearing on the rights of persons affected by disasters, a possibility also envisaged in draft article 18.

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[59] See European Court of Human Rights, *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008-II.

[60] See, for example, Guiding Principles on Internal Displacement (footnote 55), annex, principle 5.

[61] See also the Inter-Agency Standing Committee Operational Guidelines on Human Rights and Natural Disasters, 2006 (A/HRC/4/38/Add.1, annex). See also paras. (2) and (3) of the commentary to draft art. 6.

[62] See, for example, paras. (4)-(5) of the commentary to draft art. 11, below.

Article 6
Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Commentary

(1) Draft article 6 establishes the key humanitarian principles relevant to the protection of persons in the event of disasters. The Commission did not find it necessary to determine whether these principles are also general principles of international law and noted that the principles do not apply to the exclusion of other relevant principles of international law. The draft article recognizes the significance of these principles to the provision of disaster relief assistance, as well as in disaster risk reduction activities, where applicable.

(2) The principles of humanity, neutrality and impartiality are core principles recognized as foundational to humanitarian assistance.[63] The principles are likewise fundamental to applicable laws in disaster relief efforts. By way of example, the General Assembly, in its resolution 46/182, notes that: "Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality".[64]

(3) The principle of humanity stands as the cornerstone of the protection of persons in international law. Situated as an element both of international humanitarian law and international human rights law, it informs the development of laws regarding the protection of persons in the event of disasters. Within the field of international humanitarian law, the principle is most clearly expressed in the requirement of humane treatment in common article 3 of the 1949 Geneva Conventions.[65] However, as the International Court of Justice affirmed in the *Corfu Channel* case (merits), among general and well-recognized principles are "elementary considerations of humanity, even more exacting in peace than in war".[66] Pictet's commentary on the principles of the Red Cross attributes three elements to the principle of humanity, namely: to prevent and alleviate suffering; to protect life and health; and to assure respect for the individual.[67] In the specific context of disaster relief, the Oslo Guidelines and the Mohonk Criteria affirm that the principle of humanity requires that "[h]uman suffering must be addressed wherever it is found".[68]

(4) While the principle of neutrality is rooted in the law of armed conflict, the principle is nonetheless applicable in other branches of the law. In the context of humanitarian assistance, the principle of neutrality requires that the provision of assistance be independent of any given political, religious, ethnic or ideological context. The Oslo Guidelines and the Mohonk Criteria both affirm that the assistance should be provided "without engaging in hostilities or taking sides in controversies of a political, religious or

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[63] See discussion in the Memorandum by the Secretariat (A/CN.4/590), para. 11.

[64] Annex, para. 2.

[65] See art. 3, para. 1 (noting that: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria").

[66] *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4 at p. 22.

[67] J. Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary* (Geneva, Henry Dunant Institute, 1979), pp. 21-27; also available from www.icrc.org.

[68] Oslo Guidelines (see footnote 28 above), para. 20; Mohonk Criteria (see footnote 54 above), p. 196.

ideological nature".[69] As such, the principle of neutrality indicates the apolitical nature of disaster response and affirms that humanitarian activities may not be used for purposes other than responding to the disaster at hand. The principle ensures that the interest of those persons affected by disasters are the primary concern of the affected State and any other relevant actors in disaster response. Respect for the principle of neutrality is central to facilitating the achievement of an adequate and effective response to disasters, as outlined in draft article 2.

(5) The principle of impartiality encompasses three principles: non-discrimination, proportionality and impartiality proper. For reasons discussed below, the principle of non-discrimination is articulated by the Commission not merely as an element of draft article 6, but also as an autonomous principle of disaster response. Non-discrimination is directed towards the removal of objective grounds for discrimination among individuals, such that the provision of assistance to affected persons is guided solely by their needs. The principle of proportionality stipulates that the response to a disaster be proportionate to the scope of that disaster and the needs of affected persons. The principle also acts as a distributive mechanism, enabling the provision of assistance to be delivered with attention given to the most urgent needs. Impartiality proper reflects the principle that no subjective distinctions be drawn among individuals in the response to disasters. The Commentary to the First Protocol Additional to the Geneva Conventions thus conceptualizes impartiality as "a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering".[70] By way of example, the Draft International Guidelines for Humanitarian Assistance Operations provide that: "Humanitarian assistance should be provided on an impartial basis without any adverse distinction to all persons in urgent need."[71] As a whole, the principle of impartiality requires that responses to disasters be directed towards full respect and fulfilment of the needs of those affected by disasters in a manner that gives priority to the needs of the particularly vulnerable.

(6) The principle of non-discrimination, applicable also in the context of disaster risk reduction, reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive and include ethnic origin, sex, nationality, political opinions, race, religion and disability.[72] The Commission determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic at hand. Such an approach has also been taken by the Institute of International Law in its 2003 resolution on humanitarian assistance, which stipulates that the offer and distribution of humanitarian assistance shall occur "without any discrimination on prohibited grounds".[73] The IFRC

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[69] *Ibid.*

[70] See C. Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, International Committee of the Red Cross, 1987), paras. 2800-2801 (citing the "Proclamation of the Fundamental Principles of the Red Cross", adopted by resolution VIII of the 20th International Conference of the Red Cross, Vienna, 1965), and Pictet, *Commentary* (see footnote 67 above), pp. 33-51.

[71] P. MacAlister-Smith, *International Guidelines for Humanitarian Assistance Operations* (Heidelberg, Germany, Max Planck Institute for Comparative Public Law and International Law, 1991), para. 6 (a).

[72] See, *inter alia*, the 1949 Geneva Conventions, common art. 3, para. 1; Universal Declaration of Human Rights, art. 2; International Covenant on Civil and Political Rights, art. 2, para. 1; and International Covenant on Economic, Social and Cultural Rights, art. 2, para. 2. See also Convention on the Rights of Persons with Disabilities, art. 5, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), art. 7.

[73] Resolution on humanitarian assistance (see footnote 18 above), art. II, para. 3.

Guidelines likewise specify that assistance be provided to disaster-affected persons without "any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age, and political opinions)".[74]

(7) The principle of non-discrimination is not to be taken as excluding the prospect of "positive discrimination" as appropriate. The phrase "while taking into account the needs of the particularly vulnerable" in draft article 6 reflects this position. The term "vulnerable" encompasses both groups and individuals. For this reason, the neutral expression "vulnerable" was preferred to either "vulnerable groups" or "vulnerable persons". The qualifier "particularly" was used in recognition of the fact that those affected by disaster are by definition vulnerable. The specific phrasing of "particularly vulnerable" is drawn from article 4, paragraph 3 (a), of the IFRC Guidelines, which refer to the special needs of "women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses".[75] The qualifier is also mirrored in the resolution on humanitarian assistance adopted by the Institute of International Law, which refers to the requirement to take into account the needs of the "most vulnerable".[76] Similarly, the General Assembly, in its resolution 69/135 of 12 December 2014, requested:

> "Member States, relevant humanitarian organizations of the United Nations system and other relevant humanitarian actors to ensure that all aspects of humanitarian response, including disaster preparedness and needs assessments, take into account the specific humanitarian needs and vulnerabilities of all components of the affected population, in particular girls, boys, women, older persons and persons with disabilities, including in the design and implementation of disaster risk reduction, humanitarian and recovery programming and post-humanitarian emergency reconstruction, and in this regard encourages efforts to ensure gender mainstreaming … ."[77]

The Commission decided against including a list of vulnerable groups within the draft article itself in recognition of the relative nature of vulnerability. What was important was less a fixed iteration of particularly vulnerable subgroups of individuals within the broader body of persons affected, or potentially affected, by a disaster, and more a recognition that the principle of non-discrimination includes within it the positive obligation to give specific attention to the needs of the particularly vulnerable. The term "particularly vulnerable" is deliberately open-ended to include not only the categories of individuals usual associated with the concept, as mentioned above, but also other possible individuals that might find themselves being particularly vulnerable in the wake of a disaster, such as non-nationals.

(8) The Commission understood the reference to "taking into account" in a broad sense, so as also to cover, *inter alia*, accessibility to information and community participation, including engagement of vulnerable groups in the design, implementation, monitoring and evaluation and assistance provided in the event of a disaster, as well as in preparing for the possibility of a disaster.

(9) The Commission was cognizant of the fact that disasters frequently affect women, girls, boys and men differently. In many contexts, gender inequalities constrain the influence and control of women and girls over decisions governing their lives as well as their access to resources such as finance, food, agricultural inputs, land and property, technologies, education, health, secure housing and employment. They are often

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[74] IFRC Guidelines (see footnote 17 above), art. 4, para. 2 (b).

[75] *Ibid.*, art. 4, para. 3 (a).

[76] Resolution on humanitarian assistance (see footnote 18 above), art. II, para. 3.

[77] See para. 32.

disproportionately affected and exposed to risks, including increased loss of life and livelihoods and gender-based violence, during and in the aftermath of disasters. It is increasingly recognized that women and girls — like men and boys — possess skills and capacity to prepare for, respond to and recover from crisis, as actors and partners both in disaster risk reduction and humanitarian action. The capacity and knowledge of women and girls plays an important part in individual as well as community resilience. The significance of taking a gender-based approach to disaster risk management has been recognized, including in both the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters[78] and the Sendai Framework.[79]

Article 7
Duty to cooperate

In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

Commentary

(1) Effective international cooperation is indispensable for the protection of persons in the event of disasters. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself. Article 1, paragraph 3, of the Charter clearly spells it out as one of the purposes of the Organization:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Articles 55 and 56 of the Charter elaborate on Article 1, paragraph 3, with respect to international cooperation. Article 55 of the Charter reads:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> "a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> "b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

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[78] A/CONF.206/6 and Corr.1, chap. I, resolution 2, para. 13 (d): "A gender perspective should be integrated into all disaster risk management policies, plans and decision-making processes, including those related to risk assessment, early warning, information management, and education and training."

[79] Para. 19 (d): "Disaster risk reduction requires an all-of-society engagement and partnership. It also requires empowerment and inclusive, accessible and non-discriminatory participation, paying special attention to people disproportionately affected by disasters, especially the poor. A gender, age, disability and cultural perspective should be integrated into all policies and practices, and women and youth leadership should be promoted. In this context, special attention should be paid to the improvement of organized voluntary work of citizens."

> "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 of the Charter reads:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."[80]

(2) Cooperation takes on special significance with regard to international human rights obligations that have been undertaken by States. The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.[81] This has been reiterated by the Committee on Economic, Social and Cultural Rights in its general comments relating to the implementation of specific rights guaranteed by the Covenant.[82] International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities, which reaffirms existing international obligations in relation to persons with disabilities "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".[83]

(3) With regard to cooperation in the context of disaster relief assistance, the General Assembly recognized, in resolution 46/182, that:

> "The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws … ."[84]

Furthermore, with regard to cooperation in the context of risk reduction, the Sendai Framework's guiding principles, paragraph 19 (a), indicate that: "Each State has the primary responsibility to prevent and reduce disaster risk, including through international, regional, subregional, transboundary and bilateral cooperation." In addition, there exist a vast number of instruments of specific relevance to the protection of persons in the event of disasters, which demonstrate the importance of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.[85] Moreover, the duty to cooperate, in the vast majority of cases, is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish "to facilitate international cooperation to mitigate the impact of disaster". Another example can be found in an agreement between France and Malaysia:

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[80] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[81] Arts. 11, 15, 22 and 23.

[82] See, in particular, general comments No. 2 (E/1990/23-E/C.12/1990/3, annex III), No. 3 (E/1991/23-E/C.12/1990/8, annex III), No. 7 (E/1998/22-E/C.12/1997/10, annex IV), No. 14 (E/2001/22-E/C.12/2000/21) and No. 15 (E/2003/22-E/C.12/2002/13, annex IV).

[83] Art. 11.

[84] Annex, para. 5.

> "Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment …."[86]

(4) Cooperation, however, should not be interpreted as diminishing the primary role of the affected State as provided for in draft article 10, paragraph 2. Furthermore, the principle of cooperation is to be understood also as being complementary to the duty of the authorities of the affected State to take care of the persons affected by natural disasters and similar emergencies occurring in its territory, or in territory under its jurisdiction or control (draft article 10, paragraph 1).[87]

(5) A key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with intergovernmental and non-governmental organizations. The importance of their role has been recognized for some time. In its resolution 46/182, the General Assembly confirmed that:

> "Intergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts."[88]

In its resolution 2008/36 of 25 July 2008, the Economic and Social Council recognized:

> "… the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourage[d] the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-governmental organizations and other participants of the Inter-Agency Standing Committee."[89]

(6) Draft article 7 recognizes the central importance of international cooperation to international disaster relief assistance activities, as well as in the reduction of disaster risk. It reflects a legal obligation for the various parties concerned. The nature of the obligation of cooperation may vary, depending on the actor and the context in which assistance is being sought and offered. The nature of the legal obligation to cooperate is dealt with in specific provisions (hence the opening phrase "[i]n the application of the present draft

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[85] See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see Horst Fischer, "International disaster response law treaties: trends, patterns and *lacunae*", in *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (Geneva, IFRC, 2003), at pp. 24-44.

[86] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4.

[87] See also General Assembly resolution 46/182, annex, para. 4, and the Hyogo Declaration, A/CONF.206/6 and Corr.1, chap. 1, resolution 1, para. 4.

[88] See annex, para. 5.

[89] Para. 7.

articles"), particularly draft articles 8, on response to disasters, and 9, concerning the reduction of risk of disasters. The Commission inserted the phrase "as appropriate", which qualifies the entire draft article, both as a reference to existing specific rules that establish the nature of the obligation to cooperate among the various actors mentioned in the draft article, and as an indication of a degree of latitude in determining, on the ground, when cooperation is or is not "appropriate". It does not qualify the level of cooperation being envisaged, but rather the actors with whom the cooperation should take place.

(7) In addition to cooperation among States, draft article 7 also envisages cooperation with assisting actors. Express reference is made to cooperation with the United Nations, in recognition of the central role played by the Organization in the coordination of relief assistance. The Office for the Coordination of Humanitarian Affairs (OCHA) enjoys a special mandate, in accordance with General Assembly resolution 46/182 of 19 December 1991, to assist in the coordination of international assistance. Under that resolution, the Assembly established the high-level position of Emergency Relief Coordinator as the single United Nations focal point for complex emergencies as well as for natural disasters. The Emergency Relief Coordinator processes requests from affected Member States for emergency assistance requiring a coordinated response, serves as a central focal point concerning United Nations emergency relief operations and provides consolidated information, including early warning on emergencies.

(8) The reference to "other assisting actors" imports the definition contained in draft article 3, subparagraph (d), which includes competent intergovernmental organizations and relevant non-governmental organizations or entities. The Commission felt it appropriate to single out one such group of entities, namely the components of the Red Cross and Red Crescent Movement, in recognition of the important role played by the Movement in international cooperation in the context of the situations covered by the draft articles. The reference to the components of the Red Cross and Red Crescent Movement includes the International Committee of the Red Cross as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict.[90] As indicated in paragraph (18) of the commentary to draft article 3, the category of "other assisting actors" is intentionally broad. In the reduction of the risk of disasters, the cooperation with other actors is enshrined in the Sendai Framework's paragraph 19 (b), which indicates that "[d]isaster risk reduction requires that responsibilities be shared by central Governments and relevant national authorities, sectors and stakeholders", and paragraph 19 (d), which indicates that "[d]isaster risk reduction requires an all-of-society engagement and partnership".

(9) The forms of cooperation in the context of the response phase are covered by draft article 8, and in risk reduction by draft article 9.

Article 8
Forms of cooperation in the response to disasters

Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Commentary

(1) Draft article 8 seeks to clarify the various forms which cooperation between affected States, assisting States and other assisting actors may take in the context of response to

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[90] See below para. (8) of the commentary to art. 18.

disasters. Cooperation is enshrined in general terms in draft article 7 as a guiding principle and fundamental duty with regard to the present topic, as it plays a central role in disaster relief efforts. The essential role of cooperation lends itself to a more detailed enunciation of the kinds of cooperation relevant in this context. The present draft article is therefore designed to elaborate further on the meaning of draft article 7, without creating any additional legal obligations.

(2) The list of forms of cooperation in draft article 8 — humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and goods, and scientific, medical and technical resources — is loosely based on the second sentence of paragraph 4 of article 17 of the articles on the law of transboundary aquifers. That paragraph explains the general obligation to cooperate in article 7 of those articles by describing the cooperation necessary in emergency situations.[91] The second sentence of paragraph 4 of article 17 reads:

> "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."[92]

As this provision had been specifically drafted with reference to a related context — namely, the need for cooperation in the event of an emergency affecting a transboundary aquifer — the Commission felt that its language was a useful starting point for the drafting of draft article 8. However, the text of draft article 8 was tailored to appropriately reflect the context and purpose of the present draft articles and to ensure that it took into account the major areas of cooperation dealt with in international instruments addressing disaster response. Similar language is contained in the ASEAN Declaration on Mutual Assistance on Natural Disasters, of 26 June 1976, which states that:

> "Member Countries shall, within their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance."[93]

In a similar vein, in explaining the areas in which it would be useful for the United Nations to adopt a coordinating role and encourage cooperation, General Assembly resolution 46/182 calls for coordination with regard to "specialized personnel and teams of technical specialists, as well as relief supplies, equipment, and services ...".[94]

(3) The beginning of draft article 8 confirms that the forms of cooperation being referred to are those relevant in the response phase following the onset of a disaster or in the post-disaster recovery phase. They are by their nature concerned with the provision or facilitation of relief assistance to affected persons. Cooperation in the pre-disaster phase, including disaster prevention, preparedness and mitigation, is dealt with in draft article 9. At the same time, draft article 8, which is to be read in light of the other draft articles, is oriented towards the purpose of the topic as a whole as stated in draft article 2, namely, "to facilitate an adequate and effective response to disasters ... so as to meet the essential needs of the persons concerned, with full respect for their rights". In the context of the present

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[91] General Assembly resolution 63/124 of 11 December 2008, annex (for the commentary thereto, see *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

[92] *Ibid.*

[93] *ASEAN Documents Series 1976.*

[94] Annex, para. 27.

topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in draft article 8, is the protection of persons affected by disasters.

(4) While the draft article highlights specific forms of cooperation, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. The non-exhaustive nature of the list is emphasized by the use of the word "includes" and its equivalent in the other official languages. The Commission determined that the highlighted forms are the main areas in which cooperation may be warranted and that the forms are broad enough to encapsulate a wide variety of cooperative activities. Cooperation may, therefore, include the activities mentioned, but is not limited to them; other forms of cooperation not specified in the present draft article are not excluded, such as: financial support; technology transfer covering, among others, technology relating to satellite imagery; training; information-sharing; joint simulation exercises and planning; and undertaking needs assessments and situation overview.

(5) As draft article 8 is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or other assisting actors to engage in certain activities. Notwithstanding this, cooperation may also take place in the context of existing obligations. For example, an affected State may have a duty to inform or notify, at the onset of a disaster, other States and other assisting actors that have a mandated role to gather information, provide early warning and coordinate assistance provided by the international community. Such duty was envisaged in article 17 of the articles on prevention of transboundary harm from hazardous activities, adopted in 2001, which provides:

> "The State of origin shall, without delay and by the most expeditious means at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present draft articles and provide it with all relevant and available information."[illegible]

(6) The forms that cooperation may take will necessarily depend upon a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons and the capacities of the affected State and other assisting actors involved. As with the principle of cooperation itself, the forms of cooperation in draft article 8 are meant to be reciprocal in nature, as cooperation is not a unilateral act, but rather one that involves the collaborative behaviour of multiple parties.[illegible] The draft article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which harmonization of efforts through consultation on the part of both the affected State and other assisting actors may be appropriate.

(7) Cooperation in the areas mentioned must be in conformity with the other draft articles. For example, as with draft article 7, the forms of cooperation touched upon in draft article 8 must be consistent with draft article 10, which grants the affected State the primary role in disaster relief assistance, as a consequence of its sovereignty. Cooperation must also be undertaken in accordance with the requirement of consent of the affected State to external assistance (draft article 13), as well as the recognition that the affected State may place appropriate conditions on the provision of external assistance, particularly with respect to the identified needs of persons affected by a disaster and the quality of the assistance (draft article 14). Cooperation is also related to draft article 15, which recognizes the role of the affected State in the facilitation of prompt and effective assistance to persons

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[illegible] General Assembly resolution 62/68 of 6 December 2007, annex (for the commentary thereto, see *Yearbook ... 2001*, vol. II (Part Two), chap. V, sect. E).

[illegible] See above, para. (6) of the commentary to draft art. 7.

affected by a disaster. As such, and since draft article 8 does not create any additional legal obligations, the relationship between the affected State, assisting State, and other assisting actors with regard to the above-mentioned forms of cooperation will be regulated in accordance with the other provisions of the present draft articles.

(8) Humanitarian assistance is intentionally placed first among the forms of cooperation mentioned in draft article 8, as the Commission considers this type of cooperation of paramount importance in the context of disaster relief. The second category — coordination of international relief actions and communications — is intended to be broad enough to cover most cooperative efforts in the disaster relief phase, and may include the logistical coordination, supervision and facilitation of the activities and movement of disaster response personnel and equipment and the sharing and exchange of information pertaining to the disaster. Though information exchange is often referred to in instruments that emphasize cooperation in the pre-disaster phase as a preventive mode to reduce the risk of disasters,[97] communication and information is also relevant in the disaster response phase to monitor the developing situation and to facilitate the coordination of relief actions among the various actors involved. A number of instruments deal with communication and information-sharing in the disaster relief context.[98] The mention of "making available relief personnel, equipment and goods, and scientific, medical and technical resources" refers to the provision of any and all resources necessary for disaster response operations. The reference to "personnel" may entail the provision of and cooperation among medical teams, search and rescue teams, engineers and technical specialists, translators and interpreters, or other persons engaged in relief activities on behalf of one of the relevant actors — affected State, assisting State or other assisting actors. The term "resources" covers scientific, technical and medical expertise and knowledge as well as equipment, tools, medicines or other objects that would be useful for relief efforts.

Article 9
Reduction of the risk of disasters

1. Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Commentary

(1) Draft article 9 deals with the duty to reduce the risk of disasters. The draft article is composed of two paragraphs. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking certain measures and paragraph 2 provides an indicative list of such measures.

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[97] See, for example, the ASEAN Agreement, art. 18, para. 1.

[98] See, for example, the Tampere Convention, art. 3 (calling for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards and disasters" and "the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities"); and the Oslo Guidelines (see footnote 28 above), para. 54. See also discussion in the Memorandum by the Secretariat (A/CN.4/590), paras. 158-174.

(2) As indicated in draft article 2, the reduction of the risk of disasters falls within the purpose of the present draft articles. The concept of disaster risk reduction has its origins in a number of General Assembly resolutions and has been further developed through the 1994 World Conference on Natural Disaster Reduction in Yokohama,[99] the Hyogo Framework for Action and the Sendai Framework, as well as several sessions of the Global Platform for Disaster Risk Reduction.

(3) At the fourth session[100] of the Global Platform for Disaster Risk Reduction in 2013, the concluding summary by the Chair drew attention to the "growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risk assessments, the establishment of early warning systems, and the right to access risk information". At the Third United Nations World Conference on Disaster Risk Reduction, "States also reiterated their commitment to address disaster risk reduction and the building of resilience to disasters with a renewed sense of urgency".[101] The Sendai Framework indicated that "it is urgent and critical to anticipate, plan for and reduce disaster risk in order to more effectively protect persons, communities and countries" and called for "accountability for disaster risk creation … at all levels."[102] Furthermore, the Sendai Framework stated, as a principle, that "each State has the primary responsibility to prevent and reduce disaster risk, including through international, regional, subregional, transboundary and bilateral cooperation".[103] Finally, with the aim to achieve "the substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries",[104] the Sendai Framework indicated that "the following goal must be pursued: [p]revent new and reduce existing disaster risk through the implementation of integrated and inclusive economic, structural, legal, social, health, cultural, educational, environmental, technological, political and institutional measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and thus strengthen resilience."[105]

(4) The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and, at the same time, draws on principles emanating from international human rights law, including the obligations undertaken by States to respect and protect human rights, in particular the right to life. Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent harm from impending disasters. This is confirmed by the decisions of international tribunals, notably the European Court of Human Rights judgments in the *Öneryildiz v. Turkey*[106] and *Budayeva and Others v. Russia*[107] cases, which affirmed the duty to take preventive measures. In addition, draft article 9 draws inspiration from a number of international environmental law principles, including the "due diligence" principle.

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[99] See Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and Plan of Action (A/CONF.172/9), chap. I, resolution I, annex I.

[100] Geneva, 19-23 May 2013.

[101] See Sendai Declaration in General Assembly resolution 69/283 of 3 June 2015, annex I (footnote omitted).

[102] See Sendai Framework, paras. 5-6.

[103] See Sendai Framework (guiding principles), para. 19 (a).

[104] See Sendai Framework (expected outcome and goal), para. 16.

[105] See Sendai Framework's Goal, para. 17.

[106] *Öneryildiz v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.

[107] *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008-II.

(5) An important legal foundation for draft article 9 is the widespread practice of States reflecting their commitment to reduce the risk of disasters. States and international organizations have adopted multilateral, regional and bilateral instruments concerned with reducing the risk of disasters, including: the Paris Agreement (2015);[108] Transforming our world: the 2030 Agenda for Sustainable Development (2015);[109] the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015);[110] the SIDS Accelerated Modalities of Action (SAMOA) Pathway (2014);[111] the ASEAN Agreement;[112] the Beijing Action for Disaster Risk Reduction in Asia (2005);[113] the Delhi Declaration on Disaster Risk Reduction in Asia (2007);[114] the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008);[115] the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010;[116] the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific,[117] reaffirming the Hyogo Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region; "The way forward: climate and disaster resilient development in the Pacific" (meeting statement) of the Pacific Platform for Disaster Risk Management (2014);[118] the Framework of Cooperation on Strengthening Regional Cooperation of Disaster Management Authorities of Central Asian and South Caucasus Region in the Area of Disaster Risk Reduction (2015);[119] the African Union Africa Regional Strategy for Disaster Risk Reduction of 2004,[120] which was followed by a programme of action for its implementation (originally for the period between 2005 and 2010, but later extended to 2015);[121] the East African

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[108] Report of the conference of the parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the conference of the parties (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex.

[109] General Assembly resolution 70/1 of 25 September 2015.

[110] General Assembly resolution 69/313 of 27 July 2015, annex.

[111] General Assembly resolution 69/15 of 14 November 2014, annex.

[112] The ASEAN Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

[113] Adopted at the Asian Conference on Disaster Risk Reduction in Asia, which was held in Beijing from 27 to 29 September 2005. Available from http://nidm.gov.in/amcdrr/beijing.pdf (accessed on 4 July 2016).

[114] Adopted at the Second Asian Ministerial Conference on Disaster Reduction, which was held in New Delhi on 7 and 8 November 2007. Available from http://nidm.gov.in/amcdrr/declaration.asp (accessed on 4 July 2016).

[115] Adopted at the Third Asian Ministerial Conference on Disaster Risk Reduction, which was held in Kuala Lumpur from 2 to 4 December 2008. Available from www.preventionweb.net/files/3089_KLDeclarationonDisasterRiskReductioninAsia202008.pdf (accessed on 4 July 2016).

[116] Available from www.preventionweb.net/files/16327_finalincheondeclaration1028.pdf (accessed on 4 July 2016).

[117] See www.unisdr.org/files/20382_summaryof4hamcdrr.pdf (accessed on 4 July 2016).

[118] Adopted at the sixth session of the Pacific Platform for Disaster Risk Management, which was held in Suva from 2 to 4 June 2014. Available from www.pacificdisaster.net/pdnadmin/data/original/PPDRM_2014_Chairs_Summary.pdf (accessed on 4 July 2016).

[119] Adopted by the Regional Ministerial Meeting of Disaster Management Authorities of Central Asian and South Caucus Countries, which was held in Bishkek on 30 January 2015. Available from www.preventionweb.net/files/42374_frameworkofcooperationregionaldrrca.pdf (accessed on 4 July 2016).

[120] Available from www.unisdr.org/files/4038_africaregionalstrategy1.pdf (accessed on 4 July 2016).

[121] Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006-2015). Available from www.unisdr.org/files/19613_bookletpoaenglish.pdf (accessed on 4 July 2016).

Community Disaster Risk Reduction and Disaster Management Bill (2013);[122] four sessions of the African Regional Platform on Disaster Risk Reduction, the most recent one being in 2013;[123] the Yaoundé Declaration on the Implementation of the Sendai Framework in Africa (2015);[124] the Arab Strategy for Disaster Risk Reduction 2020;[125] the Sharm El Sheikh Declaration on Disaster Risk Reduction (2014);[126] the Asuncion Declaration "Guidelines towards a Regional Action Plan for the Implementation of the Sendai Framework 2015-2030" (2016);[127] the Aqaba Declaration on Disaster Risk Reduction in Cities (2013);[128] the Latin American Parliament Protocol on Disaster Risk Management in Latin America and the Caribbean (2013);[129] the Guayaquil Communiqué of the Fourth Session of the Regional Platform for Disaster Risk Reduction in the Americas (2014);[130] the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011);[131] the Outcome of the European ministerial meeting on disaster risk reduction: towards a post-2015 framework for disaster risk reduction — building the resilience of nations and communities to disasters (2014);[132] 6th annual meeting of the European Forum for Disaster Risk Reduction — Roadmap for the Implementation of the Sendai Framework (2015);[133] "Solidarity in Action", Joint Statement of the Ministers for Foreign Affairs of the South East Europe Cooperation Process (2013);[134] the European Union's Civil Protection Mechanism (2013);[135] resolution 6 on strengthening legal frameworks for disaster response, risk reduction and first aid, adopted by the 32nd

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[122] Available from www.unisdr.org/files/48230_eacdrrbill.pdf (accessed on 4 July 2016).

[123] United Nations Office for Disaster Risk Reduction, "Africa seeks united position on disaster risk reduction", 13 February 2013. Available from www.unisdr.org/archive/31224.

[124] Adopted by the Fourth High-Level Meeting on Disaster Risk Reduction, which was held in Yaoundé on 23 July 2015. Available from www.preventionweb.net/files/43907_43907yaoundedeclarationen.pdf (accessed on 4 July 2016).

[125] Adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, which was held in Cairo on 19 and 20 December 2010. Available from www.unisdr.org/files/18903_17934asdrrfinalenglishjanuary20111.pdf (accessed on 4 July 2016).

[126] Adopted at the Second Arab Conference on Disaster Risk Reduction, which was held at Sharm El Sheikh, Egypt, from 14 to 16 September 2014. Available from www.unisdr.org/files/42726_42726sharmdeclarationpublicationfin.pdf (accessed on 4 July 2016).

[127] Adopted at the 1st meeting of Ministers and High-Level Authorities on the Implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030 in the Americas, which was held in Asuncion on 8 and 9 June 2016. Available from www.preventionweb.net/files/49235_asunciondeclaration2016.pdf (accessed on 4 July 2016).

[128] Adopted at the First Arab Conference for Disaster Risk Reduction, which was held in Aqaba, Jordon, from 19 to 21 March. Available from www.preventionweb.net/files/31093_aqabadeclarationenglishfinaldraft.pdf (accessed on 4 July 2016).

[129] http://eird.org/americas/noticias/protocolo-sobre-gestion-del-riesgo.pdf (accessed on 4 July 2016).

[130] The fourth session was held in Guayaquil, Ecuador, from 27 to 29 May 2014. Available from www.preventionweb.net/files/37662_communiqueguayaquilpr1428may14[1].pdf.

[131] Adopted at the second session of the Regional Platform for Disaster Risk Reduction in the Americas, which was held in Nayarit, Mexico, from 15 to 17 March 2011. Available from www.unisdr.org/files/18603_communiquenayarit.pdf.

[132] Adopted at the European Ministerial Meeting in Milan, Italy, on 8 July 2014. Available from www.preventionweb.net/files/38378_europeandrrministerialstatement.pdf (accessed on 4 July 2016).

[133] The 6th annual meeting took place in Paris from 7 to 9 October 2015. Available from www.preventionweb.net/files/43847_efdrrroadmap20152020final.pdf (accessed on 4 July 2016).

[134] Adopted by the ministers in Ohrid, the former Yugoslav Republic of Macedonia, on 31 May 2013. Available from www.preventionweb.net/files/31414_solidarityinactionjointstatement.pdf (accessed on 4 July 2016).

[135] See Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013, *Official Journal of the European Union*, L 347.

International Conference of the Red Cross and Red Crescent (2015);[136] and the European Commission Action Plan on the Sendai Framework for Disaster Risk Reduction 2015-2030 (2016).[137]

(6) Recognition of this commitment is further shown by the incorporation by States of disaster risk reduction measures into their national policies and legal frameworks. A compilation of national progress reports on the implementation of the Hyogo Framework for Action[138] and other sources indicate that, as of 2016, 64 States or areas reported having established specific policies on disaster risk reduction, evenly spread throughout all continents and regions, including the major hazard-prone locations. They are: Algeria; Anguilla; Argentina; Armenia; Bangladesh; Bolivia (Plurinational State of); Brazil; British Virgin Islands; Canada; Cape Verde; Chile; Colombia; Cook Islands; Costa Rica; Côte d'Ivoire; Cuba; Dominican Republic; Fiji; Finland; Georgia; Germany; Ghana; Guatemala; Honduras; India; Indonesia; Italy; Japan; Kenya; Lao People's Democratic Republic; Lebanon; Madagascar; Malawi; Malaysia; Maldives; Marshall Islands; Mauritius; Mexico; Mongolia; Morocco; Mozambique; Nepal; New Zealand; Nicaragua; Nigeria; Norway; Panama; Paraguay; Peru; Poland; Saint Kitts and Nevis; Saint Lucia; Samoa; Senegal; Sri Lanka; Sweden; Switzerland; Syrian Arab Republic; Thailand; the former Yugoslav Republic of Macedonia; United Republic of Tanzania; United States of America; Vanuatu; and Venezuela (Bolivarian Republic of). More recently, the United Nations Office for Disaster Risk Reduction identified 93 States[139] that had adopted national platforms for disaster risk reduction, which, in accordance with the Sendai Framework, are government coordination forums composed of relevant stakeholders aimed "to, *inter alia*, identify sectoral and multisectoral disaster risk, build awareness and knowledge of disaster risk through sharing and dissemination of non-sensitive disaster risk information and data, contribute to and coordinate reports on local and national disaster risk, coordinate public awareness campaigns on disaster risk, facilitate and support local multisectoral cooperation (e.g. among local governments) and contribute to the determination of and reporting on national and local disaster risk management plans and all policies relevant for disaster risk management".[140] Several countries have adopted legislation specifically addressing disaster risk reduction either as stand-alone legislation or as part of a broader legal framework concerning both disaster risk management and disaster response, including: Algeria;[141] Cameroon;[142] China;[143] Cambodia,[144] Dominican Republic;[145] El Salvador;[146] Estonia;[147]

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[136] The conference was held in Geneva from 8 to 10 December 2015. Available from http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-Res6-legal-frameworks-for-disaster_EN.pdf (accessed on 4 July 2016).

[137] See SWD(2016) 205 of 16 June 2016. Available from http://ec.europa.eu/echo/sites/echo-site/files/sendai_swd_2016_205_0.pdf (accessed on 4 July 2016).

[138] Hyogo Framework for Action (see footnote 78 above), priority 1, core indicator 1.1.

[139] For a list of States that have adopted national platforms, see www.unisdr.org/partners/countries.

[140] See Sendai Framework, para. 27 (g).

[141] Law No. 04-20 of 25 December 2004 on Risk Prevention and Disaster Management in the Framework of Sustainable Development.

[142] Cameroon, Decree No. 037/PM of 19 March 2003 on the Establishment, Organization and Functions of a National Observatory on Disasters.

[143] Emergency Response Law of the People's Republic of China (2007). Available from www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471589.htm (accessed on 4 July 2016).

[144] Law on Disaster Management, NS/RKM/0715/007. Approved by the Senate on 30 June 2015. Available from www.ifrc.org/Global/Publications/IDRL/DM%20acts/Cambodia%20DM%20Law_English.pdf (accessed on 4 July 2016).

[145] Decree No. 874-09 approving the Regulation for the application of Law No. 147-02 on Risk Management and repealing Chapters 1, 2, 3, 4 and 5 of Decree No. 932-03 (2009).

[146] Law on Civil Protection and the Prevention and Mitigation of Disasters (2005).

France;[148] Georgia,[149] Guatemala;[150] Haiti;[151] Hungary;[152] India;[153] Indonesia;[154] Italy;[155] Madagascar;[156] Namibia;[157] New Zealand;[158] Pakistan;[159] Peru;[160] Philippines;[161] Republic of Korea;[162] Slovenia;[163] South Africa;[164] Thailand;[165] and the United States of America.[166]

(7) Draft article 9 is to be read together with the rules of general applicability in the present draft articles, including those principally concerned with the response to a disaster.

(8) Paragraph 1 starts with the words "Each State". The Commission opted for this formula over "States" for the sake of consistency with the draft articles previously adopted, where care had been taken to identify the State or States that bore the legal duty to act. In contrast to those draft articles dealing directly with disaster response where a distinction exists between an affected State or States and other States, in the pre-disaster phase the obligation in question applies to every State. Furthermore, as is evident from paragraph 2, the obligation to reduce risk implies measures primarily taken at the domestic level. Any such measures requiring interaction between States or with other assisting actors are meant to be covered by draft article 7. In other words, the obligation applies to each State individually. Hence the Commission decided against using the word "States" also to avoid any implication of a collective obligation.

(9) The word "shall" signifies the existence of the international legal obligation to act in the manner described in the paragraph and is the most succinct way to convey the sense of that legal obligation. While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase "by taking appropriate measures".

(10) The obligation is to "reduce the risk of disasters". The Commission adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, notably, and most recently, in

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[147] Emergency Preparedness Act (2000).

[148] Law No. 2003-699 regarding the Prevention of Technological and Natural Risks and Reparation of Damages (2003).

[149] Law on Public Safety. Document No. 2467-IIb. Available from https://matsne.gov.ge/en/document/view/2363013 (accessed on 4 July 2016).

[150] Law No. 109-96 on the National Coordinator for the Reduction of Disasters (1996).

[151] National Risk and Disaster Management Plan (2001).

[152] Act LXXIV on the Management and Organization of the Prevention of Disasters and the Prevention of Major Accidents Involving Dangerous Substances (1999).

[153] Disaster Management Act, No. 53 (2005).

[154] Law No. 24 of 2007 concerning Disaster Management.

[155] Decree on Establishing a National Platform for Disaster Risk Reduction (2008).

[156] Decree No. 2005-866 Laying Down the Procedure for Implementing Law No. 2003-010 of 5 September 2003 on National Risk and Disaster Management Policy (2005).

[157] Disaster Risk Management Act (2012).

[158] National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295).

[159] National Disaster Management Act, 2010. See also the official statement of the Government of Pakistan at the third session of the Global Platform for Disaster Risk Reduction, in 2011, available from www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf.

[160] Law No. 29664 creating the National System for Disaster Risk Management (2011).

[161] Philippine Disaster Risk Management Act 2006.

[162] Countermeasures Against National Disaster Act (1995) and National Disaster Management Act (2010).

[163] Act on Protection against Natural and Other Disasters (2006).

[164] Disaster Management Act No. 57 of 2002.

[165] Disaster Prevention and Mitigation Act (2007).

[166] Disaster Mitigation Act of 2000.

the Sendai Framework, is that the focus should be placed on the reduction of the risk of harm caused by a hazard, as distinguished from the prevention and management of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters. The duty being envisaged is one of conduct and not result; in other words not to completely prevent or mitigate a disaster, but rather to reduce the risk of harm potentially caused thereby.

(11) The phrase "by taking appropriate measures" indicates the specific conduct being required. In addition to the further specification about legislation and regulations explained in paragraph (13) below, the "measures" to be taken are qualified by the word "appropriate", which accords with common practice. The use of the word "appropriate", therefore, serves the function of specifying that it is not just any general measures that are being referred to, but rather specific and concrete measures aimed at prevention, mitigation and preparation for disasters. What might be "appropriate" in any particular case is to be understood in terms of the stated goal of the measures to be taken, namely "to prevent, mitigate, and prepare for disasters" so as to reduce risk. This is to be evaluated within the broader context of the existing capacity and availability of resources of the State in question, as has been noted in paragraph (9) above. Accordingly, the reference to "taking appropriate measures" is meant to indicate the relative nature of the obligation. The fundamental requirement of due diligence is inherent in the concept of "appropriate". It is further understood that the question of the effectiveness of the measures is implied in that formula.

(12) The paragraph indicates by means of the phrase "including through legislation and regulations", the specific context in which the corresponding measures are to be taken. The envisaged outcome consists of a number of concrete measures that are typically taken within the context of a legislative or regulatory framework. Accordingly, for those States that do not already have such a framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such a legal framework into place so as to allow for the taking of the "appropriate" measures. The phrase "legislation and regulations" is meant to be understood in broad terms to cover as many manifestations of law as possible, it being generally recognized that such law-based measures are the most common and effective way to facilitate (hence the word "through") the taking of disaster risk reduction measures at the domestic level.

(13) The word "including" indicates that while "legislation and regulations" may be the primary methods, there may be other arrangements under which such measures could be taken. The word "including" was chosen in order to avoid the interpretation that the adoption and implementation of specific legislation and regulations would always be required. This allows a margin of discretion for each State to decide on the applicable legal framework, it being understood that having in place a legal framework that anticipates the taking of "appropriate measures" is a *sine qua non* for disaster risk reduction.

(14) The phrase "through legislation and regulations" imports a reference to ensuring that mechanisms for implementation and accountability for non-performance be defined within domestic legal systems. Such issues, though important, are not the only ones that could be the subject of legislation and regulations in the area of disaster risk reduction.

(15) The last clause, namely "to prevent, mitigate, and prepare for disasters", serves to describe the purpose of the "appropriate" measures that States are to take during the pre-disaster phase to address exposure, vulnerability and the characteristics of a hazard, with the ultimate goal of reducing disaster risk. The phrase tracks the formula used in major disaster risk reduction instruments. The Commission was cognizant of the fact that adopting a different formulation could result in unintended *a contrario* interpretations as to the kinds of activities being anticipated in the draft article. In addition, the Commission was of the

opinion that this clause would also address the Sendai Framework's requirement to prevent new, and reduce existing, risk, and thus strengthen resilience.

(16) The Terminology on Disaster Risk Reduction prepared by the United Nations Office for Disaster Risk Reduction in 2009 illustrates the meaning of each of the three terms used, prevention, mitigation and preparedness:[167]

> "Prevention [is] [t]he outright avoidance of adverse impacts of hazards and related disasters.
>
> "… Prevention (i.e. disaster prevention) expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance. … Very often the complete avoidance of losses is not feasible and the task transforms to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use.
>
> "Mitigation [is] [t]he lessening or limitation of the adverse impacts of hazards and related disasters.
>
> "… The adverse impacts of hazards often cannot be prevented fully, but their scale or severity can be substantially lessened by various strategies and actions. … It should be noted that in climate change policy 'mitigation' is defined differently, being the term used for the reduction of greenhouse gas emissions that are the source of climate change.[[168]]
>
> "Preparedness [is] [th]e knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to, and recover from, the impacts of likely, imminent or current hazard events or conditions.
>
> "… Preparedness action is carried out within the context of disaster risk management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response through to sustained recovery. Preparedness is based on a sound analysis of disaster risks and good linkages with early warning systems … [The measures to be taken] must be supported by formal institutional, legal and budgetary capacities."

The Commission is cognizant that the above terms may be subject to further refinements by the General Assembly on the basis of the outcome of the Open-ended Intergovernmental Expert Working Group on Indicators and Terminology relating to Disaster Risk Reduction, established by its resolution 69/284 of 3 June 2015.

(17) Paragraph 2 lists three categories of disaster risk reduction measures, namely: the conduct of risk assessments; the collection and dissemination of risk and past loss information; and the installation and operation of early warning systems. As noted in paragraph (3) above, these three measures were singled out in the Chair's summary at the conclusion of the fourth session of the Global Platform for Disaster Risk Reduction held in May 2013. The Commission decided to refer expressly to the three examples listed as reflecting the most prominent types of contemporary disaster risk reduction efforts. The relevance of such measures was further confirmed by their inclusion in the Sendai Framework. The word "include" serves to indicate that the list is non-exhaustive. The listing of the three measures is without prejudice to other activities aimed at the reduction

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[167] See www.unisdr.org/we/inform/terminology.

[168] The Commission is conscious of the discrepancy in the concordance between the English and French versions of the official United Nations' use of the term "mitigation".

of the risk of disasters that are being undertaken at present or which may be undertaken in the future.

(18) The practical structural and non-structural measures that can be adopted are innumerable and depend on the social, environmental, financial, cultural and other relevant circumstances. Practice in the public and private sectors as well as instruments, such as the Sendai Framework, provide a wealth of examples, among which may be cited: community-level preparedness and education; the establishment of disaster risk governance frameworks; contingency planning; setting-up of monitoring mechanisms; land-use controls; construction standards; ecosystems management; drainage systems; social safety-nets addressing vulnerability and resilience; risk disclosure; risk-informed investments; and insurance.

(19) The three consecutive measures listed in paragraph 2 share a particular characteristic: they are instrumental to the development and applicability of many if not all other measures concerning normative frameworks and definitions of priorities or investment planning, both in the public and the private sector.

(20) The first measure — risk assessments — is about generating knowledge concerning hazards, exposure and vulnerabilities as well as disaster risk trends. As such, it is the first step towards any sensible measure to reduce the risk of disasters. Without a sufficiently solid understanding of the circumstances and factors, and their characteristics, that drive disaster risk no measure can be defined and enacted effectively. Risk assessments also compel a closer look at local realities and the engagement of local communities.

(21) The second measure — the collection and dissemination of risk and past loss information — is the next step. Reducing disaster risk requires action by all actors in the public and private sectors and civil society. Collection and dissemination should result in the free availability of risk and past loss information, which is an enabler of effective decisions and action. It allows all stakeholders to assume responsibility for their actions and to make a risk-informed determination of priorities for planning and investment purposes; it also enhances transparency in transactions and public scrutiny and control. The Commission wishes to emphasize the desirability of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to such information. The Commission, while recognizing the importance of that trend, felt that it was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States.

(22) The third measure concerns early warning systems, which are instrumental both in initiating and implementing contingency plans, thus limiting the exposure to a hazard; as such, they are a prerequisite for effective preparedness and response.

(23) As explained in paragraph (8) above, draft article 9 concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in draft article 7. Accordingly, the extent of any international legal duty relating to any of the listed or not listed measures that may be taken in order to reduce the risk of disasters is to be determined by way of the relevant specific agreements or arrangements each State has entered into with other actors with which it has the duty to cooperate.

Article 10
Role of the affected State

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

Commentary

(1) Draft article 10 is addressed to an affected State in the context of the protection of persons in the event of a disaster upon its territory, or in territory under its jurisdiction or control. The term "role" in the title is a broad formulation intended to cover as well the "function" of a State. Paragraph 1 reflects the obligation of an affected State to protect persons and to provide disaster relief assistance. Paragraph 2 affirms the primary role held by an affected State in the response to a disaster upon its territory, or in a territory under its jurisdiction or control.

(2) Draft article 10 is premised on the core principle of sovereignty as highlighted in the preamble to the present draft set of articles. Both the principles of sovereignty and its corollary, non-intervention, inform the Charter of the United Nations,[169] and numerous international legal instruments and judicial pronouncements.[170] In the context of disaster relief assistance, General Assembly resolution 46/182 affirms: "The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations."[171]

(3) The duty held by an affected State to ensure the protection of persons and the provision of disaster relief assistance in its territory, as recognized in paragraph 1, stems from its sovereignty. The further reference to "or in territory under its jurisdiction or control" has been inserted to align the text with the expanded meaning of the term "affected State" in draft article 3, subparagraph (b).

(4) The conception of a bond between sovereign rights and concomitant duties upon a State was expressed in particular by Judge Alvarez in an individual opinion in the *Corfu Channel* case:

> "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.
>
> "Sovereignty confers rights upon States and imposes obligations on them."[172]

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[169] Charter of the United Nations, Art. 2, paras. 1 ("The Organization is based on the principle of the sovereign equality of all its Members") and 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII").

[170] See, for example, the Declaration on Principles on International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) (noting, *inter alia*, that: "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community"; "The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention"; and "States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention"). The International Court of Justice has held that: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (see *Corfu Channel* case (footnote 66 above), at p. 35).

[171] Annex, para. 3.

[172] *Corfu Channel* case (see footnote 66 above). Individual Opinion by Judge Alvarez, p. 39, at p. 43. See also the opinion expressed by Max Huber, Arbitrator, in the *Island of Palmas* case (*the*

(5) Paragraph 1 emphasizes that the affected State is the actor that holds the duty to protect persons located within its territory or within a territory under its jurisdiction or control. The Commission considered that the term "duty" was more appropriate than the term "responsibility", which could be misunderstood given its use in other contexts.

(6) Paragraph 2 further reflects the primary role held by a State in disaster response. For the reasons expressed above, the Commission decided to adopt the word "role" rather than "responsibility" in articulating the position of an affected State. The adoption of the term "role" was inspired by General Assembly resolution 46/182, which affirms, *inter alia*, that an affected State "has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory".[173] Use of the word "role" rather than "responsibility" allows some flexibility for States in the coordination of disaster response activities. Language implying an obligation upon States to direct or control disaster response activities may, conversely, be too restrictive for States that preferred to take a more limited role in disaster response coordination because, for example, they faced a situation of limited resources.

(7) The primacy of an affected State is also grounded in the long-standing recognition in international law that the State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies. The affirmation in paragraph 2 that an affected State holds the primary role in the direction, control, coordination and supervision of disaster relief assistance should be read in concert with the duty of cooperation outlined in draft article 7. In this context, draft article 10, paragraph 2, confirms that an affected State holds the primary position in the cooperative relationships with other relevant actors contemplated in draft article 7.

(8) Reference to the "direction, control, coordination and supervision" of disaster relief assistance is drawn from article 4, paragraph 8, of the Tampere Convention.[174] The Tampere Convention formula is gaining general acceptance in the field of disaster relief assistance and represents more contemporary language.[175] The formula reflects the position that an affected State exercises control over the manner in which relief operations are carried out, which shall be in accordance with international law, including the present draft articles. Such control by an affected State is not to be regarded as undue interference with the activities of an assisting actor.

(9) The Commission departed from the Tampere Convention in deciding not to include a reference to "national law" in its articulation of the primary role of an affected State. In the context of the Tampere Convention, the reference to national law indicates that appropriate coordination requires consistency with an affected State's domestic law. The Commission decided not to include this reference in light of the fact that the internal law of

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Netherlands/United States of America), Award of 4 April 1928, *Reports of International Arbitral Awards*, vol. II, p. 839 ("Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States ...").

[173] Annex, para. 4.

[174] Tampere Convention (noting that: "Nothing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory").

[175] See, for example: the ASEAN Agreement, art. 3, para. 2 (noting that: "The Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory"); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133, art. 3 (a) (noting, *inter alia*, that unless otherwise agreed: "The overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State").

an affected State may not in all cases regulate or provide for the primary position of a State in disaster response situations.

Article 11
Duty of the affected State to seek external assistance

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

Commentary

(1) Draft article 11 addresses the particular situation in which a disaster manifestly exceeds a State's national response capacity. In these circumstances, an affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors as defined in draft article 3, subparagraph (d). The duty expounded in draft article 11 is a specification of draft articles 7 and 10. Paragraph 1 of draft article 10 stipulates that an affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. The draft article affirms the obligation of the affected State to do its utmost to provide assistance to persons in a territory under its jurisdiction or control. The duty to cooperate also underlies an affected State's duty to the extent that a disaster manifestly exceeds its national response capacity. Draft article 7 affirms that the duty to cooperate is incumbent upon not only potential assisting States or other potential assisting actors, but also affected States where such cooperation is appropriate. The Commission considers that where an affected State's national capacity is manifestly exceeded seeking assistance is both appropriate and required.

(2) The draft article stresses that a duty to seek assistance arises only to the extent that the national response capacity of an affected State is manifestly exceeded. The words "to the extent that" clarify that the national response capacity of an affected State may not always be sufficient or insufficient in absolute terms. An affected State's national capacity may be manifestly exceeded in relation to one aspect of disaster relief operations, although the State remains capable of undertaking other operations. As a whole, the phrase "[t]o the extent that a disaster manifestly exceeds its national response capacity" encompasses the situation in which a disaster appears likely to manifestly exceed an affected State's national response capacity. This flexible and proactive approach is in line with the fundamental purpose of the draft articles as expressed in draft article 2. The approach facilitates an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights. Recognition of the duty upon States in these circumstances reflects the Commission's concern to enable the provision of timely and effective disaster relief assistance.

(3) The Commission considers that the duty to seek assistance in draft article 11 also derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where the resources of the affected State are inadequate to meet protection needs. While this may occur also in the absence of any disaster, as alluded to in the commentary to draft article 5, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to adequate food, the right to health and medical services, the right to safe drinking water, the right to adequate housing, clothing and sanitation and the right to

be free from discrimination.[176] The Commission notes that the Human Rights Committee has said (see general comment No. 6 on the right to life) that a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect the right by adopting positive measures.[177] The right to life is non-derogable under the International Covenant on Civil and Political Rights, even in the event of a "public emergency which threatens the life of the nation"[178] — which has been recognized to include a "natural catastrophe" by the Human Rights Committee in general comment No. 29.[179] The International Covenant on Economic, Social and Cultural Rights states that in pursuance of the right to food:

> "The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[180]

The Committee on Economic, Social and Cultural Rights noted, in general comment No. 12 on the right to adequate food (article 11 of the Covenant), that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

> "the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. … A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food."[181]

The Commission therefore notes that "appropriate steps" to be taken by a State include seeking international assistance where domestic conditions are such that the right to food cannot be realized.

(4) Specific references to the protection of rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child[182] and the Convention on the Rights of Persons with Disabilities. Under article 23 of the African Charter on the Rights and Welfare of the Child, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster", are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

> "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in

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[176] See the examples listed in *Yearbook … 2008*, vol. II (Part One), document A/CN.4/598, para. 26.

[177] Report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, para. 5.

[178] See art. 4, para. 1.

[179] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40), vol. I, annex VI, para. 5.

[180] See art. 11.

[181] *Official Records of the Economic and Social Council, Twentieth and Twenty-first Sessions, Supplement No. 2* (E/2000/22-E/C.12/1999/11), annex V, p. 102, para. 17.

[182] *Human Rights: A Compilation of International Instruments*, vol. II, *Regional instruments* (United Nations publication, Sales No. E.97.XIV.1), sect. C, No. 39.

> situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."[183]

The phrase "all necessary measures" may encompass recourse to possible assistance from members of the international community in the event that an affected State's national capacity is manifestly exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel* case that among general and well-recognized principles are "elementary considerations of humanity, even more exacting in peace than in war".[184] Draft article 6 affirms the core position of the principle of humanity in disaster response.

(5) The Commission considers that a duty to "seek" assistance is more appropriate than a duty to "request" assistance in the context of draft article 11. The Commission derives this formulation from the duty outlined in the resolution on humanitarian assistance adopted by the Institute of International Law, which notes:

> "Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States."[185]

Similarly, the IFRC Guidelines hold that:

> "If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."[186]

In addition, the guiding principles annexed to General Assembly resolution 46/182 also appear to support a duty on the affected State to have recourse to international cooperation where an emergency exceeds its response capacity:

> "The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws."[187]

(6) The alternate formulation of "request" is incorporated in the Oslo Guidelines, which note that: "If international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximise its effectiveness."[188] The Commission considers that a "request" of assistance carries an implication that an affected State's consent is granted upon acceptance of that request by an assisting State or other assisting actor. In contrast, the Commission is of the view that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid. The term "seek" entails the proactive initiation by an affected State of a

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[183] *Ibid.*, art. 11.

[184] *Corfu Channel* case (see footnote 66 above), at p. 22 (noting that: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...").

[185] Resolution on humanitarian assistance (see footnote 18 above), art. III, para. 3.

[186] IFRC Guidelines (see footnote 17 above), guideline 3, para. 2.

[187] General Assembly resolution 46/182, annex, para. 5.

[188] Oslo Guidelines (see footnote 28 above), para. 58.

process through which agreement may be reached. Draft article 11 therefore places a duty upon affected States to take positive steps actively to seek out assistance to the extent that a disaster manifestly exceeds its national response capacity.

(7) An affected State will be in the best position, in principle, to determine the severity of a disaster situation and the limits of its national response capacity. Having said this, this assessment and that its assessment of the severity of a disaster must be carried out in good faith. The principle of good faith is expounded in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[189] which stipulates that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations",[190] "obligations under the generally recognized principles and rules of international law"[191] and "obligations under international agreements valid under the generally recognized principles and rules of international law".[192] A good faith assessment of the severity of a disaster is an element of an affected State's duty to ensure the protection of persons and provision of disaster relief assistance pursuant to draft article 10, paragraph 1.

(8) The phrase "as appropriate" was adopted by the Commission to emphasize the discretionary power of an affected State to choose from other States, the United Nations, and other potential assisting actors the assistance that is most appropriate to its specific needs. The term further reflects that the duty to seek assistance does not imply that a State is obliged to seek assistance from every source listed in draft article 11. The phrase "as appropriate" therefore reinforces the fact that an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief assistance, as outlined in draft article 10, paragraph 2.

(9) The existence of a duty to seek assistance to the extent that national capacity is manifestly exceeded does not imply that affected States should not seek assistance in disaster situations of a lesser magnitude. The Commission considers cooperation in the provision of assistance at all stages of disaster relief to be central to the facilitation of an adequate and effective response to disasters and a practical manifestation of the principle of solidarity. Even if an affected State is capable and willing to provide the required assistance, cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons.

Article 12
Offers of external assistance

1. In the event of disasters, States, the United Nations, and other potential assisting actors may offer assistance to the affected State.

2. When external assistance is sought by an affected State by means of a request addressed to another State, the United Nations, or other potential assisting actor, the addressee shall expeditiously give due consideration to the request and inform the affected State of its reply.

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[189] General Assembly resolution 2625 (XXV), annex.

[190] *Ibid.*

[191] *Ibid.*

[192] *Ibid.*

Commentary

(1) Draft article 12 acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State enshrined in draft article 10. It is an expression of the principles of solidarity and cooperation, highlighted in the preamble, which underlie the whole set of draft articles on the topic, the latter principle being specifically embodied in draft articles 7 to 9.

(2) Draft article 12 is only concerned with "offers" of assistance, not with the actual "provision" thereof. Such offers, whether made unilaterally or in response to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist. Nor does an offer of assistance create for the affected State a corresponding obligation to accept it. In conformity with the principle of the sovereignty of States and the primary role of the affected State, stressed in the preamble and which inform the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with the conditions set forth in draft article 13.

(3) Offers of assistance must be made consistent with the principles set forth in these draft articles, in particular in draft article 6. Such offers of assistance cannot be regarded as interference in the affected State's internal affairs. This conclusion accords with the statement of the Institute of International Law in its 1989 resolution on the protection of human rights and the principle of non-intervention in internal affairs of States:

> "An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened, cannot be considered an unlawful intervention in the internal affairs of that State."[193]

(4) Draft article 12 addresses the question of offers of assistance to affected States made by those most likely to be involved in such offers after the occurrence of a disaster, namely States, the United Nations and other assisting actors. The term "other assisting actor", qualified by the word "potential", is defined in draft article 3, subparagraph (d), to comprise a competent intergovernmental organization or a relevant non-governmental organization or entity. The United Nations and intergovernmental organizations not only are entitled, as mandated by their constituent instruments, but are also encouraged to make offers of assistance to the affected State.

(5) Non-governmental organizations or entities may be well placed, because of their nature, location and expertise, to provide assistance in response to a particular disaster. The position of non-governmental organizations or entities in carrying out relief operations is not a novelty in international law. The 1949 Geneva Conventions already provided that, in situations of armed conflict:

> "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."[194]

Similarly, Protocol II to the 1949 Geneva Conventions provides that:

> "Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for

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[193] Institute of International Law, *Yearbook*, vol. 63, Part II, Session of Santiago de Compostela (1989), p. 339, at p. 345, art. 5.

[194] See, for example, Geneva Convention I, art. 3, para. 2.

> the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked."[195]

The important contribution of non-governmental organizations or entities, working with strictly humanitarian motives, in disaster response was stressed by the General Assembly in its resolution 43/131 of 8 December 1988 on humanitarian assistance to victims of natural disasters and similar emergency situations. In that resolution, the Assembly, *inter alia*, invited all affected States to "facilitate the work of [such] organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential" and appealed "to all States to give their support to [those] organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations".[196]

(6) The use of the verb "may" in paragraph 1 is intended to emphasize that, in the context of offers of external assistance, what matters is the possibility open to all potential assisting actors to make an offer of assistance, regardless of their status and the legal grounds on which they can base their action.

(7) Paragraph 2 finds inspiration in article 3 (e) of the 2000 Framework Convention on Civil Defence Assistance, according to which: "Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time."[197] The paragraph aims at introducing a greater balance within the text of the draft articles as a whole, by providing a countervailing obligation on the part of States, or other potential assisting actors, when confronted with a request by an affected State for external assistance. The obligation is established in parallel to that in draft article 13, paragraph 3, namely the obligation of the affected State to make known its decision regarding an offer made to it in a timely manner. However, the obligation is formulated differently in each of the two articles in recognition that the position of an affected State, in the wake of a disaster falling within the scope of the present draft articles, is different from that of an assisting State or other assisting actor.

(8) Paragraph 2 has three components. First, the seeking of external assistance by the affected State triggers the application of the provision. While, in draft article 11, the duty on the affected State is a general duty to "seek" assistance, this paragraph deals with the scenario where specific assistance is sought by the affected State "by means of a request addressed to" the enumerated list of potential assisting actors. Such specification is important since it limits the application of the provision to specific requests, and not general appeals for assistance.

(9) Second, the provision refers to the various addressees of a request for assistance, including other States, the United Nations and other potential assisting actors, which is a cross-reference to the definition in draft article 3, subparagraph (d). The United Nations is singled out for special mention given the central role it plays in receiving requests for assistance.

(10) Third, paragraph 2 sets an obligation on the addressee or addressees of the specific request, which is structured in two parts: first, to give due consideration to the request; and,

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[195] See art. 18, para. 1.

[196] See General Assembly resolution 43/131, paras. 4-5.

[197] See also the ASEAN Agreement, art. 4 (c) ("In pursuing the objective of this Agreement, the Parties shall ... promptly respond to a request for assistance from an affected Party"); and the SAARC [South Asian Association for Regional Cooperation] Agreement on Rapid Response to Natural Disasters (Malé, 26 May 2011), art. 4.

second, to inform the affected State of its or their reply thereto. Both obligations contain the term "expeditiously", which is a reference to timeliness. The formulation of the obligation to give "due consideration to the request" is drawn from similar wording in article 19 of the articles on diplomatic protection, adopted in 2006.[198] The word "due" is meant less in the sense of timeliness, which is already covered by the notion of expeditious, and more as a reference to giving the request careful consideration.

Article 13
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

Commentary

(1) Draft article 13 addresses consent of an affected State to the provision of external assistance. As a whole, it creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 places a duty upon an affected State to make known, whenever possible, its decision regarding an offer of external assistance in a timely manner.

(2) The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[199] The Tampere Convention stipulates that "[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party",[200] while the ASEAN Agreement notes that "external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party".[201] Recognition of the requirement of State consent to the provision of external assistance comports with the position in draft article 10, paragraph 2, that an affected State has the primary role in the direction, control, coordination and supervision of disaster relief assistance in its territory or in territory under its jurisdiction or control.

(3) The recognition, in paragraph 2, that an affected State's right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 10, which affirms that an affected State "has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory or in territory under its jurisdiction or control".

(4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory, or in territory under its jurisdiction or control, in the

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[198] General Assembly resolution 62/67 of 6 December 2007, and for the commentary thereto, see *Yearbook ... 2006*, vol. II (Part Two), chap. IV, sect. E.

[199] General Assembly resolution 46/182, annex, para. 3.

[200] See art. 4, para. 5.

[201] See art. 3, para. 1.

event of a disaster, is aimed at preserving the life and dignity of the persons affected by the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory, or in territory under its jurisdiction or control.[202] The Human Rights Committee has interpreted the right to life as embodied in article 6 of the International Covenant on Civil and Political Rights to contain the obligation for States to adopt positive measures to protect this right.[203] An offer of assistance that is met with refusal might thus under certain conditions constitute a violation of the right to life. The General Assembly reaffirmed in its resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990 that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[204]

(5) Recognition that an affected State's discretion regarding consent is not unlimited is reflected in the Guiding Principles on Internal Displacement.[205] The Guiding Principles, which have been welcomed by the former Commission on Human Rights and the General Assembly in unanimously adopted resolutions and described by the Secretary-General as "the basic international norm for protection" of internally displaced persons, provide:[206]

> "Consent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance."[207]

The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. Its 1989 resolution on the protection of human rights and the principle of non-intervention in the internal affairs of States, article 5, paragraph 2, states in the authoritative French text:

> "Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires."[208]

In 2003, the Institute of International Law revisited this issue, stipulating in its resolution on humanitarian assistance under the heading "Duty of affected States not arbitrarily to reject *bona fide* humanitarian assistance":

> "Affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or

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[202] See International Covenant on Civil and Political Rights, art. 6, para. 1.

[203] General comment No. 6 (see footnote 177 above), para. 5 ("The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures").

[204] General Assembly resolution 43/131, preambular paragraph 8; and General Assembly resolution 45/100, preambular paragraph 6.

[205] E/CN.4/1998/53/Add.2, annex.

[206] A/59/2005, para. 210.

[207] E/CN.4/1998/53/Add.2, annex, principle 25, para. 2.

[208] Institute of International Law, *Yearbook*, vol. 63, Part II (deliberations of the Institute during Plenary Meetings), Session of Santiago de Compostela (1989), p. 339, at p. 345. The French text is presented in mandatory language, while the English translation reads: "States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance." The explanatory text, "où la population est gravement menacée dans sa vie ou sa santé", is drawn from art. 5, para. 1, of that resolution.

> would amount to a violation of the ban on starvation of civilians as a method of warfare."[209]

(6) In the context of armed conflict, the Security Council has frequently called upon parties to the conflict to grant humanitarian access, and on a number of occasions it has adopted measures in relation to humanitarian relief operations.[210] In response to the humanitarian crisis caused by the conflict in Syria, the Security Council has adopted a more proactive approach. In resolution 2139 (2014) of 22 February, it condemned all cases of denial of humanitarian access and recalled that "arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law".[211] In resolution 2165 (2014) of 14 July 2014, the Security Council decided to authorize United Nations humanitarian agencies and their implementing partners to use routes across conflict lines and specified border crossings to provide humanitarian assistance to people in need, with notification by the United Nations to the Syrian authorities.[212]

(7) The term "withheld" implies a temporal element in the determination of arbitrariness. Both the refusal of assistance, and the failure of an affected State to make known a decision in accordance with draft article 13, paragraph 3, within a reasonable time frame, may be deemed arbitrary. This view is reflected in General Assembly resolutions 43/131[213] and 45/100,[214] which each include the following preambular paragraphs:

> "*Concerned* about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,
>
> "*Convinced* that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number".

The 2000 Framework Convention on Civil Defence Assistance likewise reflects among the principles that States parties, in terms of providing assistance in the event of a disaster, undertake to respect that: "Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time."[215]

(8) The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not made in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with the principles of humanity, neutrality and

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[209] Resolution on humanitarian assistance (see footnote 18 above), art. VIII, para. 1.

[210] In relation to northern Iraq, by Security Council resolution 688 (1991) of 5 April 1991; in relation to Bosnia and Herzegovina, by resolution 770 (1992) of 13 August 1992 and resolution 781 (1992) of 9 October 1992; and in relation to Somalia, by resolution 794 (1992) of 3 December 1992.

[211] Security Council resolution 2139 (2014) of 22 February 2014, preambular para. 10.

[212] Security Council resolution 2165 (2014) of 14 July 2014, operative para. 2.

[213] Preambular paras. 9-10.

[214] Preambular paras. 8-9.

[215] Framework Convention on Civil Defence Assistance, art. 3 (e), also quoted in para. (7) of the commentary to draft art. 12.

impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.

(9) In 2013, the Secretary-General requested the Office for the Coordination of Humanitarian Affairs to engage in further analysis on the issue of arbitrary withholding of consent to humanitarian relief operations. According to the resulting guidance document,[216] consent is withheld arbitrarily if: (a) it is withheld in circumstances that result in the violation by a State of its obligations under international law; or (b) the withholding of consent violates the principles of necessity and proportionality; or (c) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate. Even if the guidance addresses situations of armed conflict, it provides valuable insights in order to establish factors for the determination of when withholding of consent can be considered "arbitrary". It is evident that, in fact as well as in law, situations of armed conflict differ from disasters. Nevertheless, in the context of the non-arbitrary withholding of consent, the subjacent legal issue presents itself in similar terms in both kinds of situation.

(10) An affected State's discretion to determine the most appropriate form of assistance is an aspect of its primary role in the direction, control, coordination and supervision of disaster relief assistance under draft article 10, paragraph 2. This discretion must be exercised in good faith in accordance with an affected State's international obligations.[217] The Commission encourages affected States to give reasons where consent to assistance is withheld. The provision of reasons is fundamental to establishing the good faith of an affected State's decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.

(11) In this vein, it is generally accepted in international law that good faith has, *inter alia*, the purpose of limiting the admissible exercise of rights and discretion. The International Court of Justice and international arbitral tribunals have in a number of cases examined this function of good faith.[218] Thus, good faith serves as an outer limit of sovereignty and the exercise of discretion, both in cases where the decision of a State necessitates the taking into account of political factors, as well as when the performance of treaty obligations is at stake. *A fortiori* this is the case when the treaty provision in question imposes positive obligations to act in a certain manner, as for example in article 6 of the International Covenant on Civil and Political Rights referred to above.

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[216] D. Akande and E. Gillard, *Oxford Guidance on the Law Regulating Humanitarian Relief Operations in Situations of Armed Conflict*, commissioned and to be published later in 2016 by the United Nations Office for the Coordination of Humanitarian Affairs.

[217] See, for example, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, para. 1 (noting, *inter alia*, that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations", "obligations under the generally recognized principles and rules of international law" and "obligations under international agreements valid under the generally recognized principles and rules of international law").

[218] *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 57, at pp. 63-64; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 212; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at p. 229, para. 145; and *The North Atlantic Coast Fisheries Case (Great Britain, United States of America), Reports of International Arbitral Awards*, 7 September 1910, vol. XI, at p. 188.

(12) In paragraph 3, the Commission opted for the phrase "make known its decision regarding the offer in a timely manner" to give a certain degree of flexibility to affected States in determining how best to respond to offers of assistance. It is recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States in disaster situations. This is balanced by the indication that the decision ought to be timely, so as to allow the actor or actors offering the external assistance the opportunity to react appropriately. The Commission considers the current formulation to encompass a wide range of possible means of response, including a general publication of the affected State's decision regarding all offers of assistance. The paragraph applies to both situations where an affected State accepts assistance and situations in which an affected State withholds its consent.

(13) The Commission considers the phrase "whenever possible" to have a restricted scope. The phrase directs attention to extreme situations where a State is incapable of forming a view regarding consent due to the lack of a functioning Government or circumstances of equal incapacity. The phrase is thus meant to convey the sense of general flexibility on which the provision is built. The phrase also circumscribes the applicability of the expression "in a timely manner". The Commission is further of the view that an affected State is capable of making its decision known in the manner it feels most appropriate if the exceptional circumstances outlined in this paragraph are not applicable.

Article 14
Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Commentary

(1) Draft article 14 addresses the setting of conditions by the affected State on the provision of external assistance in its territory or in territory under its jurisdiction or control. It affirms the right of the affected State to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The draft article indicates how such conditions are to be determined. The identified needs of the persons affected by disasters and the quality of the assistance guide the nature of the conditions. It also requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

(2) The draft article furthers the principle enshrined in draft article 10, which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. By using the phrasing "may place conditions", which accords with the voluntary nature of the provision of assistance, draft article 14 acknowledges the right of the affected State to impose conditions for such assistance, preferably in advance of a disaster's occurrence but also in relation to specific forms of assistance by particular actors during the response phase. The Commission makes reference to "external" assistance because the scope of the provision covers the assistance provided by third States or other assisting actors, but not assistance provided from internal sources, such as domestic non-governmental organizations.

(3) The draft article places limits on an affected State's right to condition assistance, which must be exercised in accordance with applicable rules of law. The second sentence

outlines the legal framework within which conditions may be imposed, which comprises "the present draft articles, applicable rules of international law, and the national law of the affected State". The Commission included the phrase "the present draft articles" to stress that all conditions must be in accordance with the principles reflected in the draft articles, there being no need to repeat an enumeration of the humanitarian and legal principles already addressed elsewhere, notably, sovereignty, good faith and the humanitarian principles dealt with in draft article 6, that is, humanity, neutrality, impartiality and non-discrimination.

(4) The reference to national law emphasizes the authority of domestic laws in the particular affected area. It does not, however, imply the prior existence of national law (internal law) addressing the specific conditions imposed by an affected State in the event of a disaster. Although there is no requirement of specific national legislation before conditions can be fixed, they must be in accordance with whatever relevant domestic legislation is in existence in the affected State, as envisaged in draft article 15.

(5) The affected State and the assisting actor must both comply with the applicable rules of national law of the affected State. The affected State may only impose conditions that are in accordance with such laws and the assisting actor must comply with such laws at all times throughout the duration of assistance. This reciprocity is not made explicit in the draft article, since it is inherent in the broader principle of respect for national law. Existing international agreements support the affirmation that assisting actors must comply with national law. The ASEAN Agreement, for example, provides in article 13, paragraph 2, that: "Members of the assistance operation shall respect and abide by all national laws and regulations." Several other international agreements also require assisting actors to respect national law[219] or to act in accordance with the law of the affected State.[220]

(6) The duty of assisting actors to respect national law implies the obligation to require that: members of the relief operation observe the national laws and regulations of the affected State;[221] the head of the relief operation take all appropriate measures to ensure the observance of the national laws and regulations of the affected State;[222] and assisting personnel cooperate with national authorities.[223] The obligation to respect the national law and to cooperate with the authorities of the affected State accords with the overarching principle of the sovereignty of the affected State and the principle of cooperation.

(7) The right to condition assistance is the recognition of a right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance is

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[219] See, for example, the Inter-American Convention to Facilitate Disaster Assistance, *OAS Official Records* (OEA/Ser.A/49 (SEPF), p. 15, arts. VIII and XI, para. d; and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, art. 8, para. 7.

[220] *Ibid.*; and the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters (1998), arts. 5 and 9. Available from www.bsec-organization.org/documents/LegalDocuments/agreementmous/agr4/Documents/Emergencyagreement%20071116.pdf (accessed on 4 July 2016).

[221] See, for example, the Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, United Nations, *Treaty Series*, vol. 2105, No. 36605, p. 457, annex X, para. 1) ("The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party").

[222] See, for example, the ASEAN Agreement, art. 13, para. 2 ("The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations").

[223] See, for example, MacAlister-Smith, *International Guidelines* (footnote 71 above), para. 22 (b) ("At all times during humanitarian assistance operations the assisting personnel shall … [c]ooperate with the designated competent authority of the receiving State").

appropriate. The third sentence of the draft article gives an explanation of what is required of conditions set by affected States, namely, that they must "take into account" not only the identified needs of the persons affected by disasters but also the quality of the assistance. Nevertheless, the phrase "take into account" does not denote that conditions relating to the identified needs and the quality of assistance are the only ones that States can place on the provision of external assistance.

(8) The Commission included the word "identified" to signal that the needs must be apparent at the time conditions are set and that needs can change as the situation on the ground changes and more information becomes available. It implies that conditions should not be arbitrary, but be formulated with the goal of protecting those affected by a disaster. "Identified" indicates that there must be some process by which needs are made known, which can take the form of a needs assessment, preferably also in consultation with assisting actors. However, the procedure to identify needs is not predetermined and it is left to the affected State to follow the most suitable one. This is a flexible requirement that may be satisfied according to the circumstances of a disaster and the capacities of the affected State. In no instance should identifying needs hamper or delay prompt and effective assistance. The provision of the third sentence is meant to "meet the essential needs of the persons concerned" in the event of a disaster, as expressed in draft article 2, and should be viewed as further protection of the rights and needs of persons affected by disasters. The reference to "needs" in both draft articles is broad enough to encompass the special needs of women, children, the elderly, persons with disabilities, and vulnerable or disadvantaged persons and groups.

(9) The inclusion of the word "quality" is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, *inter alia*, safety, security, nutrition and cultural appropriateness.

(10) Draft article 14 contains a reference to the "scope and type of assistance sought." This is in line with previous international agreements that contain a similar provision.[224] By the use of the words "shall indicate" the draft article puts the onus on the affected State to specify the type and scope of assistance sought when placing conditions on assistance. At the same time, it implies that once fixed, the scope and type of such assistance will be made known to the assisting actors that may provide it, which would facilitate consultations. This will increase the efficiency of the assistance process and will ensure that appropriate assistance reaches those in need in a timely manner.

(11) The Commission considered several possibilities for the proper verb to modify the word "conditions". The Commission's decision to use two different words, "place" and "formulate", is a stylistic choice that does not imply differentiation of meaning between the two uses.

Article 15
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding:

(a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

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[224] See, for example, the Tampere Convention, art. 4, para. 2) ("[a] State Party requesting telecommunication assistance shall specify the scope and type of assistance required").

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Commentary

(1) Draft article 15 addresses the facilitation of external assistance. This includes ensuring that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires, in paragraph 2, the affected State to ensure that its relevant legislation and regulations are readily accessible to assisting actors.

(2) The draft article provides that affected States "shall take the necessary measures" to facilitate the prompt and effective provision of assistance. The phrase "take necessary measures, within its national law" may include, *inter alia*, legislative, executive or administrative measures. Measures may also include actions taken under emergency legislation, as well as permissible temporary adjustment or waiver of the applicability of particular national legislation or regulations, where appropriate. It can also extend to practical measures designed to facilitate external assistance, provided that they are not prohibited by national law. In formulating the draft article in such a manner, the Commission encourages States to allow for temporary non-applicability of their national laws that might unnecessarily hamper assistance in the event of disasters and for appropriate provisions on facilitation to be included within their national law so as not to create any legal uncertainty in the critical period following a disaster when such emergency provisions become necessary. Certain facilitation measures may also remain necessary even after the need for assistance has passed, in order to guarantee an efficient and appropriate withdrawal, handover, exit and/or re-export of relief personnel, equipment and unused goods upon termination of external assistance. This is emphasized by the use of the expression "disposal thereof" in paragraph 1 (b). While the focus of draft article 15 is on the affected State, the facilitation for the benefit of persons affected by disasters implies that a transit State will likely take the necessary measures, within its national law, to ensure an effective provision of external assistance.

(3) The draft article outlines examples of areas of assistance in which national law should enable the taking of appropriate measures. The words "in particular" before the examples indicate that this is not an exhaustive list, but rather an illustration of the various areas that may need to be addressed by national law to facilitate prompt and effective assistance. Guidance on such measures can be found in relevant instruments, such as the 2007 IFRC Guidelines and the related 2013 Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.[225]

(4) Subparagraph (a) envisages facilities for relief personnel. The areas addressed in the subparagraph provide guidance on how personnel can be better facilitated. Granting of privileges and immunities to assisting actors is an important measure included in many international agreements to encourage the help of foreign aid workers.[226] Waiver or expedition of visa and entry requirements and work permits is necessary to ensure prompt

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[225] Elaborated by IFRC, the Office for the Coordination of Humanitarian Affairs and the Inter-Parliamentary Union, 2013.

[226] See, for example, the Framework Convention, art. 4, para. 5 ("[t]he Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance").

assistance.[227] Without a special regime in place, workers may be held up at borders or be unable to work legally during the critical days after a disaster, or forced to exit and re-enter continually so as not to overstay their visas. Freedom of movement means the ability of workers to move freely within a disaster area in order to properly perform their specifically agreed functions.[228] Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.

(5) Subparagraph (b) addresses equipment and goods, as defined in draft article 3, subparagraph (g), which encompasses supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment and other objects for disaster relief assistance. The Commission intends that this category also includes search dogs, which are normally regarded as goods and equipment, rather than creating a separate category for animals. Goods and equipment are essential to the facilitation of effective assistance and national laws must be flexible to address the needs of persons affected by disasters and to ensure prompt delivery. Customs requirements and tariffs, as well as taxation, should be waived or lessened in order to reduce costs and prevent delay in the provision of goods.[229] Equipment and goods that are delayed can quickly lose their usefulness and normal procedures in place aiming at protecting the economic interests of a State can become an obstacle in connection with aid equipment that can save lives or provide needed relief. States can therefore reduce, prioritize or waive inspection requirements at borders with regard to equipment and goods related to assisting States and other assisting actors. National regulation can also address overflight and landing rights, tools, minimization of documentation required for import and transit of equipment and goods and temporary recognition of foreign registration of vehicles. Subparagraph (b) does not provide an exhaustive list of potential measures aimed at facilitating external assistance in relation to equipment and goods. For instance, given the crucial role of telecommunications in emergency situations, it will often be necessary to reduce or limit regulations restricting the use of telecommunication equipment or of the radio-frequency spectrum, as envisaged by the 1998 Tampere Convention.

(6) The second paragraph of the draft article requires that all relevant legislation and regulations be readily accessible to assisting actors. By using the words "readily accessible", what is required is ease of access to such laws, including, when necessary, their translation into other languages, without creating the burden on the affected State to provide this information separately to all assisting actors. This paragraph also confirms the importance of States introducing domestic regulations concerning the facilitation of external assistance in advance of disasters, as envisaged in draft article 9, paragraph 1.

Article 16
Protection of relief personnel, equipment and goods

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[227] The League of Red Cross Societies has long noted that "the obtaining of visas for disaster and relief delegates and teams remains a time-consuming procedure, which often delays the dispatch of such delegates and teams", thus delaying the vital assistance the affected State has a duty to provide. Resolution 13 adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October-1 November 1975.

[228] See M. El Baradei, and others, *Model Rules for Disaster Relief Operations*, Policy and Efficacy Studies No. 8 (United Nations publication, Sales No. E.82.XV.PE/8), annex A, rule 16, which states that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions".

[229] This is stressed in various international treaties. See, for example, the Tampere Convention, art. 9, para. 4; and the ASEAN Agreement, art. 14, para. b.

The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance.

Commentary

(1) Draft article 16 establishes the obligation for the affected State to take the measures that would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. Taking into account the often chaotic situations arising from disasters, the security concerns for such individuals and objects might create obstacles for the carrying out of activities aimed at giving support to the victims, thus reducing the likelihood that their essential needs would be properly satisfied.

(2) This draft article, therefore, complements draft article 15 in establishing a coherent set of obligations whereby the affected State is expected to perform a series of activities that are necessary in order to guarantee to assisting States and other assisting actors the possibility to deliver efficient and prompt assistance. Nevertheless, the two provisions have a somewhat different focus and approach. Draft article 15 highlights the need for the affected State to establish a domestic legal order capable of facilitating the external assistance, mainly through the adoption of a series of legislative and regulatory actions. On the other hand, the question of the protection of relief personnel and their equipment and goods has traditionally — and for compelling policy reasons owing to its nature and the kind of measures to be adopted — been dealt with as a distinct matter, deserving of its own separate treatment, as the present draft article does.

(3) The measures to be adopted by the affected State may vary in content and can imply different forms of State conduct due to the context-driven nature of the obligation concerned. In particular, the flexibility inherent in the concept of "appropriate measures" suggests that the affected State may assume different obligations depending on the actors involved in potential threats to relief personnel, equipment and goods.

(4) A preliminary requirement for the affected State is to prevent its organs from adversely affecting relief activities. In this case, the duty imposed on the affected State is not to cause harm to the personnel, equipment and goods involved in external assistance through acts carried out by its organs.

(5) Secondly, draft article 16 contemplates a series of measures to be adopted to prevent detrimental activities caused by non-State actors aimed, for instance, at profiting from the volatile security conditions that may ensue from disasters in order to obtain illicit gains from criminal activities directed against disaster relief personnel, equipment and goods. The affected State is not expected to succeed, whatever the circumstances, in preventing the commission of harmful acts but rather to endeavour to attain the objective sought by the relevant obligation. In particular, the wording "appropriate measures" allows a margin of discretion to the affected State in deciding what actions to take in this regard. It requires the State to act in a diligent manner in seeking to avoid the harmful events that may be caused by non-State actors. Measures to be taken by States in the realization of their best efforts to achieve the expected objective are context-dependent. Consequently, draft article 16 does not list the means to achieve the result aimed at, as this obligation can assume a dynamic character according to the evolving situation.

(6) Diverse circumstances might be relevant to evaluate the appropriateness of the measures to be taken in a disaster situation in implementation of this obligation. These include the difficulties that a State might encounter when attempting to perform its regular activities, due to the unruly situation created by the magnitude of the disaster and the

deterioration of its economic situation, and the extent of the resources at the disposal of the concerned State, which might have been seriously affected by the disaster, as well as its capacity to exercise control in some areas involved in the disaster. The same applies to the security conditions prevailing in the relevant area of operations and the attitude and behaviour of the humanitarian actors involved in relief operations. In fact, even if external actors are requested to consult and cooperate with the affected State on matters of protection and security they might disregard the directive role attributed to the local authorities, thus increasing the possibility of their being faced with security risks. Furthermore, if harmful acts are directed against relief personnel, equipment and goods, the affected State shall address them by exercising its inherent competence to repress crimes committed within the area on which a disaster occurs.

(7) International humanitarian actors can themselves contribute to the realization of the goal sought by adopting, in their own planning and undertaking of operations, a series of mitigation measures geared to reducing their vulnerability to security threats. This may be achieved, for instance, through the elaboration of proper codes of conduct, training activities and furnishing appropriate information about the conditions under which their staff are called upon to operate and the standards of conduct they are required to meet. In any event, the adoption of such mitigating measures should not interfere with the taking of autonomous measures by the affected State.

(8) At the same time, it must be emphasized that security risks should be evaluated having in mind the character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. Draft article 16 should not be misinterpreted as entailing the creation of unreasonable and disproportionate hurdles for relief activities. As already emphasized with regard to draft article 15, the measures that, based on security concerns, may be adopted to restrict the movement of relief personnel should not result in unnecessarily inhibiting the capacity of these actors to provide assistance to the victims of disasters.

(9) Similarly, the possibility of resorting to armed escorts in disaster relief operations to dispel safety concerns should be strictly assessed according to the best practices developed in this area by the main humanitarian actors. Particular attention is drawn to the 2013 Inter-agency Standing Committee Non-binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys,[230] which are designed to assist relevant actors in evaluating, in an appropriate manner, the taking of such a sensitive course of action. As explained in that document, humanitarian convoys will not, as a general rule, use armed escorts unless exceptional circumstances are present that make the use of armed escorts necessary. In order for the exception to be adopted, the consequences of and the possible alternatives to the use of armed escorts should be considered by the relevant actors, especially taking into account that the security concerns that may prevail in disaster situations may be far less serious than those present in other scenarios.

(10) Draft article 16 provides protection for "relief personnel, equipment and goods", that is, the pertinent persons and objects qualified as such in draft article 3, subparagraphs (f) and (g), and involved in providing external assistance. As emphasized in other provisions of the current draft articles, mainly draft articles 10 and 13, external assistance is contingent upon the consent of the affected State, which has the primary role in the direction, control, coordination and supervision of such activities. Therefore, once the affected State has requested assistance or has accepted offers submitted by assisting States, it shall endeavour to guarantee the protection prescribed in draft article 16.

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[230] Endorsed by the Inter-agency Standing Committee on 27 February 2013.

(11) Such a comprehensive approach is relevant for the proper fulfilment of the obligation enshrined in draft article 16. Domestic authorities are best placed to assure a proper safety framework for the performance of relief activities. In particular, they are requested to evaluate the security risks that might be incurred by international relief personnel, to cooperate with them in dealing with safety issues and to coordinate the activities of external actors, taking into account those concerns.

(12) In accordance with draft article 3, subparagraph (f), the relief personnel that would potentially benefit from draft article 16 may belong to either the civilian or military personnel sent, as the case may be, by an assisting State or other assisting actor, namely a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent. All these categories are, thus, pertinent regarding the application of draft article 16. The reference to the term "external assistance" reflects the position, also affirmed in the commentary to draft article 14,[231] that the articles only regulate the activities of actors that are external to the affected State.

(13) Equipment and goods, as defined in draft article 3, subparagraph (g), relating to the activities of relief personnel, likewise benefit from the application of draft article 16. Being at the disposal of assisting States or other assisting actors, equipment and goods will be covered by the application of draft article 16 independently from their origin. These objects could also be directly acquired in the domestic market of the affected State. The wording "present in its territory or in territory under its jurisdiction or control" is intended to clarify this aspect.

Article 17
Termination of external assistance

The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination.

Commentary

(1) Draft article 17 deals with the question of termination of external assistance. The provision is comprised of three sentences. The first sentence confirms the basic right of the actors concerned, namely the affected State, the assisting State, the United Nations, or other assisting actor, to terminate external assistance at any time. The second sentence sets out the requirement that parties intending to terminate assistance provide appropriate notification. The third sentence concerns the requirement that the affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor consult each other as regards the termination of external assistance, including the modalities of such termination. It is understood that the reference to termination of assistance includes both whole or partial termination. An express reference to the United Nations among the potential assisting actors has also been made in draft article 17, given its central role in the provision of relief assistance.

(2) When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided. Draft article 10, paragraph 2, explicitly recognizes that the affected State has the primary role in the direction, control, coordination

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[231] See above para. (2) of the commentary to draft art. 14.

and supervision of disaster relief assistance in its territory. For its part, draft article 13 requires the consent of the affected State to external assistance, with the caveat that consent shall not be withheld arbitrarily. The combined import of the foregoing provisions is that the affected State can withdraw consent, thereby terminating external assistance.

(3) Draft article 17 does not recognize the right of only the affected State to unilaterally terminate assistance. Instead, the Commission acknowledges that assisting States, the United Nations and other assisting actors may themselves need to terminate their assistance activities. Draft article 17 thus preserves the right of any party to terminate the assistance being provided.

(4) Draft article 17 should be read in light of the purpose of the draft articles, as indicated in draft article 2. Accordingly, decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster, namely, whether and how far such needs have been met so that the termination of external assistance does not adversely impact persons affected by a disaster as a premature decision to terminate assistance could be a setback for recovery.

(5) The Commission anticipates that termination may become necessary for a variety of reasons and at different stages during the provision of assistance. The relief operations may reach a stage where either the affected State or one or more of the assisting actors feel they must cease operations. Circumstances leading to termination may include instances in which the resources of an assisting State or other assisting actor are depleted or where the occurrence of another disaster makes the diversion of resources necessary. In a similar vein, affected States ought to be able to terminate assistance that had become irrelevant or had deviated from the original offers. Draft article 17 is flexible, allowing for the adjustment of the duration of assistance according to the circumstances, while implying that parties should consult in good faith. Draft article 17 is drafted in bilateral terms, but it does not exclude the scenario of multiple assisting actors providing external assistance.

(6) In the Commission's 1989 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols thereto,[232] article 9, paragraph 2, states that "the diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time". According to the corresponding commentary, "the words 'at any time' are not intended to legitimize any arbitrary withdrawal of consent".[233]

(7) The second sentence establishes a requirement of notification by the party intending to terminate external assistance. Appropriate notification is necessary to ensure a degree of stability in the situation, so that no party is adversely affected by an abrupt termination of assistance. The provision is drafted flexibly so as to anticipate notification before, during or after the consultation process. No procedural constraints have been placed on the notification process. However, notification should be "appropriate" according to the circumstances, including the form and timing, preferably early, of the notification.

(8) The requirement to consult, in the third sentence, reflects, as stressed in the preamble, the spirit of solidarity and cooperation implicit throughout the draft articles and the principle of cooperation enshrined in draft articles 7 and 8. The word "modalities" refers to the procedures to be followed in terminating assistance. Even though termination on a mutual basis may not always be feasible, consultation in relation to the modalities would enable the relevant parties to facilitate an amicable and efficient termination. The

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[232] *Yearbook ... 1989*, vol. II (Part Two), para. 72.

[233] *Ibid.*, para. (4) of the commentary to draft art. 9.

reference to the term "as appropriate" clarifies that the anticipated consultation takes place between the affected State, on the one hand, and, on the other hand, any other actor (whether an assisting State, the United Nations or other assisting actor) providing the assistance.

Article 18
Relationship to other rules of international law

1. The present draft articles are without prejudice to other applicable rules of international law.

2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

Commentary

(1) Draft article 18 deals with the relationship between the draft articles and other rules of international law. It seeks to clarify the way in which the draft articles interact with certain rules of international law that either deal with the same subject matter as the draft articles or are not directly concerned with disasters but would nonetheless apply in situations covered by the draft articles.

(2) The reference to "other rules" in the title aims at safeguarding the continued application of existing obligations regarding matters covered by the present draft articles. The formulation "other applicable rules of international law", in paragraph 1, is intentionally flexible, without referring to such other rules as being "special" in relation to the draft articles, since that may or may not be the case depending on their content.

(3) Paragraph 1 is meant to cover different forms of "other applicable rules of international law". Those include, in particular, more detailed rules enshrined in treaties the scope of which falls *ratione materiae* within that of the present draft articles (for example, regional or bilateral treaties on mutual assistance in case of disasters) as well as those included in treaties devoted to other matters but which contain specific rules addressing disaster situations.[234]

(4) This draft article also deals, in paragraph 1, with the interaction between the present draft articles and rules of international law that are not directly concerned with disasters, but that nonetheless may be applied in the event of disasters. Examples would be provisions concerning the law of treaties — in particular, those related to supervening impossibility of performance and fundamental change of circumstances — as well as the rules on the responsibility of States and international organizations and the responsibility of individuals. The provision confirms that such a category of rules is not displaced by the present draft articles.

(5) The without prejudice clause in draft article 18 also applies to the rules of customary international law. In fact, the draft articles do not cover all the issues that may be relevant in the event of disasters. Moreover, the draft articles do not intend to preclude the further development of rules of customary international law in this field. As such, the draft article is inspired by the preambular paragraph of the Vienna Convention on the Law of Treaties of 1969,[235] which states that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

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[234] See, for example, sect. 5, art. F, of the annex to the 1965 Convention on Facilitation of International Maritime Traffic (modified in 1978), United Nations, *Treaty Series*, vol. 1110, No. 8564, p. 318, at p. 320.

[235] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

(6) In addition, it should be borne in mind that rules of general application not directly concerned with disasters might also be contained in treaty law. The Commission therefore considered that the wording "other applicable rules of international law" was the most appropriate to indicate all rules of international law that might interact with the draft articles, for it expresses the idea that the without prejudice clause in draft article 18 applies to all categories of international law rules.

(7) Paragraph 2 deals specifically with the relationship between the draft articles and international humanitarian law. The provision is formulated in a manner intended to clarify the relationship by giving precedence to the rules of international humanitarian law.

(8) The Commission considered including an express exclusion of the applicability of the draft articles in situations of armed conflict as a further element in the definition of "disaster" (draft article 3, subparagraph (a)), so as to avoid any interpretation that, for purposes of the draft articles, armed conflict would be covered to the extent that the threshold criteria in draft article 3 were satisfied. Such approach was not followed since a categorical exclusion could be counterproductive, particularly in situations of "complex emergencies" where a disaster occurs in an area where there is an armed conflict. A blank exclusion of the applicability of the draft articles because of the coexistence of an armed conflict would be detrimental to the protection of the persons affected by the disaster, especially when the onset of the disaster predated the armed conflict.[236]

(9) In such situations, the rules of international humanitarian law shall be applied as *lex specialis*, whereas the rules contained in the present draft articles would continue to apply "to the extent" that legal issues raised by a disaster are not covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international) even when occurring concomitantly with disasters, their humanitarian activities in accordance with the mandate assigned to them by international humanitarian law.

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[236] See above para. (10) of the commentary to draft art. 3, subparagraph (a).

Chapter V
Identification of customary international law

A. Introduction

50. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur.[237] At the same session, the Commission had before it a note by the Special Rapporteur (A/CN.4/653).[238] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[239]

51. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum by the Secretariat on the topic (A/CN.4/659).[240] At the same session, the Commission decided to change the title of the topic to "Identification of customary international law".

52. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/672)[241] and decided to refer draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently considered the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session.

53. At its sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (A/CN.4/682) and decided to refer to the Drafting Committee the draft conclusions contained in that report. The Commission subsequently took note of draft conclusions 1 to 16 as provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions (A/CN.4/L.869).[242] The Commission also requested the Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law.[243]

B. Consideration of the topic at the present session

54. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695), and an addendum to that report (A/CN.4/695/Add.1) providing a bibliography on the topic. The fourth report addressed the suggestions made by States and

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[237] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305-314).

[238] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 157-202.

[239] *Ibid.*, para. 159.

[240] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 64.

[241] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 135.

[242] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 60.

[243] *Ibid.*, para. 61.

others on the draft conclusions provisionally adopted and contained suggestions for the amendment of several draft conclusions in light of the comments received. It also addressed ways and means to make the evidence of customary international law more readily available, recalling the background of the prior work of the Commission on that matter as a basis for further consideration by the Commission in the context of the topic. In addition, the Commission had before it a memorandum by the Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

55. The Commission considered the fourth report of the Special Rapporteur, as well as the memorandum by the Secretariat, at its 3301st to 3303rd meetings, from 19 to 24 May 2016. At its 3303rd meeting, on 24 May 2016, the Commission referred to the Drafting Committee the proposed amendments to the draft conclusions contained in the fourth report of the Special Rapporteur.[244]

56. At its 3303rd meeting, on 24 May 2016, the Commission also requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.

57. The Commission considered and adopted the report of the Drafting Committee on draft conclusions 1 to 16 (A/CN.4/L.872) at its 3309th meeting, on 2 June 2016. It accordingly adopted a set of 16 draft conclusions on identification of customary international law on first reading (sect. C.1 below).

58. At its 3291th meeting, on 2 May 2016, the Commission decided to establish an open-ended working group, under the Chairmanship of Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission. The working group held five meetings between 3 and 11 May 2016.

59. At its 3338th to 3340th meetings, on 5 and 8 August 2016, the Commission adopted the commentaries to the draft conclusions on identification of customary international law (see sect. C.2 below).

60. At its 3340th meetings on 8 August 2016, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions (sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

61. At its 3340th meeting, on 8 August 2016, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Sir Michael Wood, which had enabled the Commission to bring to a successful conclusion its first reading of the draft conclusions on identification of customary international law.

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[244] See fourth report on identification of customary international law (A/CN.4/695), annex (Proposed amendments to draft conclusion 3 (Assessment of evidence for the two elements), draft conclusion 4 (Requirement of practice), draft conclusion 6 (Forms of practice), draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)) and draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences)).

C. Text of the draft conclusions on identification of customary international law adopted by the Commission

1. Text of the draft conclusions

62. The text of the draft conclusions adopted by the Commission on first reading is reproduced below.

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Part Four
Accepted as law (*opinio juris*)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

2. Text of the draft conclusions and commentaries thereto

63. The text of the draft conclusions and commentaries thereto adopted by the Commission on first reading at its sixty-eighth session is reproduced below.

Identification of customary international law

General commentary

(1) The present draft conclusions concern the methodology for identifying rules of customary international law.[245] They seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. This matter is not only of concern to specialists in public international law; others, including those involved with national courts, are increasingly called upon to apply or advise on customary international law. Whenever doing so, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination.

(2) Customary international law remains an important source of public international law.[246] In the international legal system, such unwritten law, deriving from practice

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[245] As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

[246] Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law; and such rules may be taken into account in treaty interpretation in accordance with article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 (hereinafter "1969 Vienna Convention")). It may

accepted as law, can be an effective means for subjects of international law to regulate their behaviour and it is indeed often invoked by States and others. Customary international law is, moreover, among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law".[247] This wording reflects the two constituent elements of customary international law: a general practice and its acceptance as law (also referred to as *opinio juris*).

(3) The identification of customary international law is a matter on which there is a wealth of material, including case law and scholarly writings.[248] The draft conclusions reflect the approach adopted by States, as well as by international courts and tribunals and within international organizations. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, they aim to offer clear guidance without being overly prescriptive.

(4) The 16 draft conclusions that follow are divided into seven parts. Part One deals with scope and purpose. Part Two sets out the basic approach to the identification of customary international law, the "two element" approach. Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification, "a general practice" and "acceptance as law" (*opinio juris*). Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law. Parts Six and Seven deal with two exceptional cases: the persistent objector; and particular customary international law (being rules of customary international law that apply only among a limited number of States).

Part One
Introduction

Part One, comprising a single draft conclusion, defines the scope of the draft conclusions, outlining their function and purpose.

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

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sometimes be necessary, moreover, to determine the law applicable at the time when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. A rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 93-96, paras. 174-179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of the International Court of Justice, 3 February 2015, para. 88).

[247] This wording was proposed by the Advisory Committee of Jurists, established by the League of Nations in 1920 to prepare a draft Statute for the Permanent Court of International Justice; it was retained, without change, in the Statute of the International Court of Justice in 1945. While the drafting has been criticized as imprecise, the formula is nevertheless widely considered as capturing the essence of customary international law.

[248] For a bibliography on customary international law, including sections that correspond to issues covered by some of the draft conclusions, as well as sections addressing the operation of customary international law in various fields, see the fourth report of the Special Rapporteur (A/CN.4/695/Add.1), annex II.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern the way in which rules of customary international law are to be identified, that is, the legal methodology for undertaking that exercise.

(2) The term "customary international law" is used throughout the draft conclusions, being in common use and most clearly reflecting the nature of this source of international law. Other terms that are sometimes found in legal instruments (including constitutions), in case law and in scholarly writings include "custom", "international custom", and "international customary law" as well as "the law of nations" and "general international law".[249] The reference to "rules" of customary international law includes rules that are sometimes referred to as "principles" (of law) because they have a more general and fundamental character.[250]

(3) The terms "identify" and "determine" are used interchangeably in the draft conclusions and commentaries. The reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise scope is disputed. This may be the case, for example, where there is disagreement as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact equate to an existing rule of customary international law, or where the question arises whether there are exceptions to a recognized rule of customary international law.

(4) Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.

(5) A number of other matters fall outside the scope of the draft conclusions. First, they do not address the content of customary international law; they are concerned only with the

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[249] Some of these terms may be used in other senses; in particular, "general international law" is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law. For a judicial discussion of the term "general international law" see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of the International Court of Justice (16 December 2015), Separate Opinion of Judge Donoghue (para. 2), Separate Opinion of Judge *ad hoc* Dugard (paras. 12-17).

[250] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288-290, para. 79 ("The association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, since in this context [of defining the applicable international law] "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term "principles" may be justified because of their more general and more fundamental character"); *The Case of the S.S. "Lotus", P.C.I.J., Series A*, No. 10 (1927), p. 16 ("the Court considers that the words "principles of international law", as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States").

methodological issue of how rules of customary international law are to be identified.[251] Second, no attempt is made to explain the relationship between customary international law and other sources of international law; the draft conclusions touch on this only in so far as is necessary to explain how rules of customary international law are to be identified, for example the relevance of treaties for such purpose. Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations. Finally, the draft conclusions do not address the position of customary international law within national legal systems.

Part Two
Basic approach

Part Two sets out the basic approach to the identification of customary international law. Comprising two draft conclusions, it specifies that determining a rule of customary international law requires establishing the existence of the two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*). This requires a careful analysis of the evidence for each element.

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice and whether such general practice is accepted as law (that is, accompanied by *opinio juris*[252]). In other words, one must look at what States actually do and seek to understand whether they recognize an obligation or a right to act in that way. This methodology, the "two element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.[253]

(2) A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law; together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a close examination of available evidence to establish their presence in any given case. This has been confirmed, *inter alia*, in the case law of the

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[251] In this connection it is important to note that reference is made in these commentaries to particular decisions of courts and tribunals in order to illustrate the methodology, not for the substance of the decisions.

[252] The Latin term has been retained alongside "acceptance as law" not only because of its prevalence in legal discourse, including the synonymous use of the term in the jurisprudence of the International Court of Justice, but also because it may capture better the particular nature of this subjective element of customary international law as referring to legal conviction and not to formal consent.

[253] The shared view of parties to a case as to the existence and content of what they regard to be a rule of customary international law is not sufficient; it must be ascertained that a general practice that is accepted as law indeed exists: *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at pp. 97-98, para. 184.

International Court of Justice, which refers to "two conditions [that] must be fulfilled"[254] and has repeatedly laid down that "the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*".[255] To establish that a claim concerning the existence and/or the content of a rule of customary international law is well founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law).[256] The test must always be: is there a general practice that is accepted as law?

(3) Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist. In the *Colombian-Peruvian asylum case*, for example, the International Court of Justice considered that the facts relating to the alleged existence of a rule of (particular) customary international law disclosed:

> "so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence".[257]

(4) As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[258] While writers have from time to time sought to devise

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[254] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[255] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122-123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29-30, para. 27; *North Sea Continental Shelf* (see footnote 254 above), at p. 44, para. 77.

[256] For example, in the *Jurisdictional Immunities of the State* case, an extensive survey of the practice of States in the form of national legislation, judicial decisions, and claims and other official statements, which was found to be accompanied by *opinio juris*, served to identify the scope of State immunity under customary international law (*Jurisdictional Immunities of the State* (see footnote 255 above), at pp. 122-139, paras. 55-91).

[257] *Colombian-Peruvian asylum case, Judgment of November 20th 1950: I.C.J. Reports 1950*, p. 266, at p. 277.

[258] In the *Right of Passage* case, for example, the Court found that there was nothing to show that the recurring practice of passage of Portuguese armed forces and armed police between Daman and the Portuguese enclaves in India, or between the enclaves themselves through Indian territory, was permitted or exercised as of right. The Court explained that: "Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at pp. 40-43). In *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that: "The emergence, as *lex lata*, of a customary rule specifically

alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories are not supported by States or in the case law.

(5) The two-element approach is often referred to as "inductive", in contrast to possible "deductive" approaches by which rules may be ascertained on account of legal reasoning rather than empirical evidence of a general practice and its acceptance as law (*opinio juris*). The two-element approach does not in fact preclude a measure of deduction, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law (accompanied by *opinio juris*),[259] or when concluding that possible rules of international law form part of an "indivisible regime".[260]

(6) The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches, each with its own approach to sources.[261] While the application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates,[262] the essential nature of customary international law as a general practice accepted as law (accompanied by *opinio juris*) must always be respected.

Conclusion 3

Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Commentary

(1) Draft conclusion 3 concerns the assessment of evidence for the two constituent elements of customary international law.[263] The two paragraphs of the draft conclusion offer general guidance for the process of determining the existence (or non-existence) and

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prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 73). See also *Prosecutor v. Sam Hinga Norman*, Special Court for Sierra Leone, Case No. SCSL-2004-14-AR72(E), decision on preliminary motion based on lack of jurisdiction (child recruitment) of 31 May 2004, p. 13, para. 17.

[259] This appears to be the approach in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 55-56, para. 101.

[260] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 674, para. 139.

[261] See conclusions of the work of the Study Group on fragmentation of international law, *Yearbook ... 2006*, vol. II (Part Two), para. 251 (1).

[262] See draft conclusion 3, below.

[263] The term "evidence" is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.

content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflects both the rigorous analysis required and the dynamic nature of customary international law as a source of international law.

(2) Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.[264] Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the necessary flexibility, to all fields of international law.

(3) The requirement that regard be had to the overall context reflects the need to apply the two-element approach while taking into account the subject matter that the rule is said to regulate. This implies that in each case any underlying principles of international law that may be applicable to the matter ought to be taken into account.[265] Moreover, the type of evidence consulted (and consideration of its availability or otherwise) is to be adjusted to the situation, and certain forms of practice and evidence of acceptance as law (*opinio juris*) may be of particular significance, depending on the context. For example, in the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that:

> "In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States."[266]

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[264] See also *North Sea Continental Shelf* (footnote 254 above), Dissenting Opinion of Judge Tanaka, at p. 175: "To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances."

[265] In the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that the customary rule of State immunity derived from the principle of sovereign equality of States and, in that context, had to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory (*Jurisdictional Immunities of the State* (see footnote 255 above), at pp. 123-124, para. 57). See also *Certain Activities carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River* (footnote 249 above), Separate Opinion of Judge Donoghue (paras. 3-10).

[266] *Jurisdictional Immunities of the State* (see footnote 255 above), at p. 123, para. 55. In the *Navigational and Related Rights* case, where the question arose whether long-established practice of fishing for subsistence purposes (acknowledged by both parties to the case) has evolved into a rule of (particular) customary international law, the International Court of Justice observed that: "the

(4) The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). In particular, where prohibitive rules are concerned (such as the prohibition of torture) it may sometimes be difficult to find positive State practice (as opposed to inaction); cases involving such rules will most likely turn on evaluating whether the practice (being deliberate inaction) is accepted as law.[267]

(5) Given that conduct may be fraught with ambiguities, paragraph 1 further indicates that regard must be had to the particular circumstances in which any evidence is to be found; only then may proper weight be accorded to it. In the *United States Nationals in Morocco* case, for example, the International Court of Justice, in seeking to ascertain whether a rule of (particular) customary international existed, said:

> "There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position."[268]

When considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. And practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law.

(6) Paragraph 2 states that to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and explains that this calls for an assessment of evidence for each element. In other words, practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, but two distinct inquiries are to be carried out. While the constituent elements may be intertwined in fact (in the sense that practice may be accompanied by a certain motivation), each is conceptually distinct for purposes of identifying a rule of customary international law.

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practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant" (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 265-266, para. 141). The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted the difficulty of observing State practice on the battlefield: *Prosecutor v. Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 99.

[267] On inaction as a form of practice see draft conclusion 6 and the commentary thereto, para. (3).

[268] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 176, at p. 200.

(7) Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law. Moreover, acceptance as law (*opinio juris*) is to be sought with respect not only to those taking part in the practice but also to those in a position to react to it. No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature".[269]

(8) Paragraph 2 emphasizes that the existence of one element may not be deduced merely from the existence of the other and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*). A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.

(9) While in the identification of a rule of customary international law the existence of a general practice is often the initial factor to be considered, and only then an inquiry is made into whether such general practice is accepted as law, this order of inquiry is not mandatory. The identification of a rule of customary international law may also begin with appraising a written text or statement allegedly expressing a certain legal conviction and then seeking to verify whether there is a general practice corresponding to it.

Part Three
A general practice

As stated in draft conclusion 2, the indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law (*opinio juris*) be ascertained. Part Three offers more detailed guidance on the first of these two constituent elements of customary international law, "a general practice". Also known as the "material" or "objective" element,[270] it refers to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. A number of factors must be considered in evaluating whether a general practice does in fact exist.

Conclusion 4
Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

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[269] *North Sea Continental Shelf* (see footnote 254 above), at p. 44, para. 76. In the *"Lotus"* case, the Permanent Court of International Justice likewise held that: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty" (*The Case of the S.S. "Lotus"* (see footnote 250 above), at p. 28). See also draft conclusion 10, para. (2), below.

[270] Sometimes also referred to as *usus* (usage), but this may lead to confusion with "mere usage or habit", which is to be distinguished from customary international law: see draft conclusion 9, para. 2, below.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 4 specifies whose practice is to be taken into account when determining the existence of a rule of customary international law and the role of such practice.

(2) Paragraph 1 makes clear that it is principally the practice of States that is to be looked to in determining the existence and content of rules of customary international law; the material element of customary international law is indeed often referred to as "State practice".[271] The word "primarily" reflects the primacy of States as subjects of international law possessing a general competence and emphasizes the pre-eminent role that their conduct has for the formation and identification of customary international law. The International Court of Justice held in *Military and Paramilitary Activities in and against Nicaragua* that in order "to consider what are the rules of customary international law applicable to the present dispute … it has to direct its attention to the practice and *opinio juris* of States".[272] At the same time, the word "primarily" indicates that it is not exclusively State practice that is relevant and directs the reader to paragraph 2.

(3) Paragraph 2 concerns the practice of international organizations and indicates that "in certain cases" such practice also contributes to the identification of rules of customary international law. References in the draft conclusions and commentaries to the practice of States should thus be read as including, in those cases where it is relevant, the practice of international organizations. The paragraph deals with practice attributed to international organizations themselves, not that of their member States acting within them (which is attributed to the States in question).[273] The term "international organizations" refers, for the purposes of these draft conclusions and commentaries, to organizations that are established by instruments governed by international law, usually treaties, and that also possess their own international legal personality. The term does not include non-governmental organizations (NGOs).

(4) International organizations are not States.[274] They are entities established and empowered by States (or by States and/or international organizations) to carry out certain

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[271] State practice serves other important functions in public international law, including in relation to treaty interpretation (see chap. VI of the present report on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties").

[272] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 97, para. 183. In the *Jurisdictional Immunities of the State* case, the Court confirmed that it is "State practice from which customary international law is derived" (*Jurisdictional Immunities of the State* (see footnote 255 above), at p. 143, para. 101).

[273] See also draft conclusions 6, 10 and 12, below, which refer, *inter alia*, to the practice (and acceptance as law) of States within international organizations.

[274] See also the draft articles on the responsibility of international organizations adopted by the Commission in 2011, general commentary, para. (7): "International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ('principle of speciality'). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules

functions, and to that end have been granted international legal personality, that is, they may have their own rights and obligations under international law. Their practice in international relations may also count as practice that, when accompanied by acceptance as law (*opinio juris*), gives rise or attests to rules of customary international law in the fields in which they operate,[275] but only in certain cases, as described below.[276]

(5) Most clearly, the practice coming within the scope of paragraph 2 arises where member States have transferred exclusive competences to the international organization so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States. This is the case for certain competences of the European Union.

(6) Practice within the scope of paragraph 2 may also arise, in certain cases, where member States have not transferred exclusive competences, but have conferred powers upon the international organization that are functionally equivalent to the powers exercised by States. The practice of secretariats of international organizations when serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), or in taking positions on the scope of privileges and immunities for the organization and its officials, might contribute to the formation, or expression, of rules of customary international law in those areas. The acts of international organizations that are not functionally equivalent to the acts of States are unlikely to be relevant practice.

(7) The practice of international organizations may be of particular relevance with respect to rules of customary international law that are addressed specifically to them, such as those on their international responsibility or relating to treaties to which they are parties.

(8) At the same time, caution is required in assessing the relevance and weight of such practice. International organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. The reaction of member States to such practice is of importance. Among other factors to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose conduct is under consideration; the subject matter of the rule in question and whether the organization itself would be bound by the rule; whether the conduct is *ultra vires* the organization or the organ; and whether the conduct is consonant with that of the member States of the organization.

(9) Paragraph 3 makes explicit what may be implicit in paragraphs 1 and 2, namely that the conduct of entities other than States and international organizations — for example, NGOs, non-State armed groups, transnational corporations and private individuals — is neither creative nor expressive of customary international law. As such, their conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. The paragraph recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating

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including treaty obligations by which they are bound" (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 88).

[275] Practice that is external to the international organization (that is, practice in its relations with States, international organizations and others) may be particularly relevant for the identification of customary international law.

[276] See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 178 ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights").

or recording practice and acceptance as law (*opinio juris*) by States and international organizations.[277] Although the conduct of non-State armed groups is not practice that may be said to be constitutive or expressive of customary international law, the reaction of States to it may well be. Likewise, the acts of private individuals may also sometimes be relevant, but only to the extent that States have endorsed or reacted to them.[278]

(10) Official statements of the International Committee of the Red Cross (ICRC), such as appeals and memoranda on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of ICRC may serve as helpful records of relevant practice. Such activities may thus contribute to the development and determination of customary international law; but they are not practice as such.[279]

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Commentary

(1) Although in their international relations States most frequently act through the executive, draft conclusion 5 explains that State practice consists of any conduct of the State, whatever the branch concerned and functions at issue. In accordance with the principle of the unity of the State, this includes the conduct of any organ of the State forming part of the State's organization and acting in that capacity, whether in exercise of executive, legislative, judicial or "other" functions, such as commercial activities or the giving of administrative guidance to the private sector.

(2) To qualify as State practice, the conduct in question must be "of the State". The conduct of any State organ is to be considered conduct of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity that has that status in accordance with the internal law of the State; the conduct of a person or entity otherwise empowered by the law of the State to exercise elements of governmental authority is conduct "of the State", provided the person or entity is acting in that capacity in the particular instance.[280]

(3) The relevant practice of States is not limited to conduct *vis-à-vis* other States or other subjects of international law; conduct within the State, such as a State's treatment of its own nationals, may also relate to matters of international law.

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[277] In the latter capacity their output may fall within the ambit of draft conclusion 14. The Commission has considered a similar point with respect to practice by "non-State actors" under its topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties": see chapter VI of the present report, para. 73 (draft conclusion 5, para. 2).

[278] See, for example, *Dispute regarding Navigational and Related Rights* (footnote 266 above), at pp. 265-266, para. 141.

[279] This is without prejudice to the significance of acts of ICRC in exercise of specific functions conferred upon it by, in particular, the 1949 Geneva Conventions.

[280] *Cf.* articles 4 and 5 of the articles on the responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, paras. 76-77.

(4) State practice may be that of a single State or of two or more States acting together. Examples of practice of the latter kind may include joint action by several States patrolling the high seas to combat piracy or cooperating in launching a satellite into orbit. Such joint action is to be distinguished from action by international organizations.[281]

(5) Practice must be publicly available or at least known to other States[282] in order to contribute to the formation and identification of rules of customary international law. Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is revealed.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Commentary

(1) Draft conclusion 6 indicates the types of conduct that are covered under the term "practice", providing examples thereof and stating that no type of practice has *a priori* primacy over another. It refers to forms of practice as empirically verifiable facts and avoids, for present purposes, a distinction between an act and its evidence.

(2) Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. While some writers have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice; action may at times consist solely in statements, for example a protest by one State addressed to another.

(3) Paragraph 1 further makes clear that inaction may count as practice. The words "under certain circumstances" seek to caution, however, that only deliberate abstention from acting may serve such a role; the State in question needs to be conscious about refraining from acting in a given situation. Examples of such omissions (sometimes referred to as "negative practice") include abstaining from instituting criminal proceedings; refraining from exercising protection in favour of certain naturalized persons; and abstaining from the threat or use of force.[283]

(4) Paragraph 2 provides a list of forms of practice that are often found to be useful for the identification of customary international law. As the words "but are not limited to" emphasize, this is a non-exhaustive list; in any event, given the inevitability and pace of

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[281] See also draft conclusion 4, para. 2, above, and the accompanying commentary.

[282] Or, in the case of particular customary international law, to at least one other State or a group of States (see draft conclusion 16, below).

[283] For illustrations, see *The Case of the S.S. "Lotus"* (footnote 250 above), at p. 28; *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 22; *Jurisdictional Immunities of the State* (see footnote 255 above), at p. 135, para. 77.

change, both political and technological, it would be impractical to draw up a list of all the numerous forms that practice might take.[284] The forms of practice listed are no more than examples, which, moreover, may overlap (for example, "diplomatic acts and correspondence" and "executive conduct").

(5) The order in which the forms of practice are listed in paragraph 2 is not intended to be significant. Each is to be interpreted broadly to reflect the multiple and diverse ways in which States act and react; the expression "executive conduct", for example, refers comprehensively to: any executive acts, including executive orders, decrees and other measures; official statements on the international plane, before a legislature or to the media; and claims before national or international courts and tribunals. The expression "legislative and administrative acts" similarly embraces any form of regulatory disposition effected by a public authority. "Operational conduct 'on the ground'" includes law enforcement and seizure of property, as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons. The words "conduct in connection with treaties" cover all acts related to the negotiation and conclusion of treaties, as well as their implementation; by concluding a treaty a State may be engaging in practice in the domain to which the treaty relates, for example maritime delimitation agreements or host country agreements. The reference to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" likewise includes all acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted by States within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding. Whether any of these examples of forms of practice are in fact relevant in a particular case will depend, *inter alia*, on the particular alleged rule being considered.[285]

(6) Decisions of national courts at all levels may count as State practice[286] (though it is likely that greater weight will be given to the higher courts); decisions that have been overruled on the particular point are unlikely to be considered relevant. The role of decisions of national courts as a form of State practice is to be distinguished from their potential role as a "subsidiary means" for the determination of rules of customary international law.[287]

(7) Paragraph 3 clarifies that in principle no form of practice has a higher probative value than others in the abstract. In particular cases, however, as explained in the commentaries to draft conclusions 3 and 7, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

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[284] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II, document A/1316, Part II, p. 368, para. 31.

[285] See para. (3) of the commentary to draft conclusion 3.

[286] See, for example, *Jurisdictional Immunities of the State* (footnote 255 above), at pp. 131-135, paras. 72-77; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24, para. 58. The term "national courts" may also include courts with an international element operating within one or more domestic legal systems, such as courts or tribunals with mixed national and international composition.

[287] See draft conclusion 13, para. 2, below. Decisions of national courts may also be evidence of acceptance as law (*opinio juris*), on which see draft conclusion 10, para. 2, below.

2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Commentary

(1) Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of draft conclusion 8). As the two paragraphs of draft conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.

(2) Paragraph 1 states, first, that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State. This means that the practice examined should be exhaustive, within the limits of its availability, that is, including the relevant practice of all of the State's organs and all relevant practice of a particular organ. The paragraph states, moreover, that such practice is to be assessed as a whole; only then can the actual position of the State be determined.

(3) The requirement to assess all available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, where the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict. Yet a different position was adopted by the Special Supreme Court; by the Greek Government when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights, and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the International Court of Justice to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument".[288]

(4) Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As paragraph (3) above demonstrates, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be inconsistent, that State's contribution to the "general practice" element may be reduced or even nullified.

(5) The use of the word "may" indicates, however, that such assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases. In the *Fisheries case*, for example, the International Court of Justice held that:

> "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice. They may be easily understood in the light of the variety of facts and conditions prevailing in the long period."[289]

In this vein, for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ. For present purposes, practice of organs of a central government will often be more significant than that of constituent units of a federal State or political subdivisions of the State; and the practice of the executive branch is often the most relevant on the international plane, though account may need to be taken of the constitutional position of the various organs in question.[290]

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[288] *Jurisdictional Immunities of the State* (see footnote 255 above), at p. 134, para. 76. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 246 above), at p. 98, para. 186.

[289] *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Commentary

(1) Draft conclusion 8 concerns the requirement that the practice must be general; it seeks to capture the essence of this requirement and the inquiry that is needed in order to verify whether it has been met in a particular case.

(2) Paragraph 1 explains that the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be both "extensive and virtually uniform";[291] it must be a "settled practice".[292] As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context.[293] In each case, however, the practice should be of such a character as to make it possible to discern a constant and uniform usage.

(3) The requirement that the practice be "widespread and representative" does not lend itself to exact formulations, as circumstances may vary greatly from one case to another (for example, the frequency with which circumstances calling for action arise).[294] As regards diplomatic relations, for example, in which all States regularly engage, a practice would have to be widely exhibited, while with respect to international canals, of which there are very few, the amount of practice would necessarily be less. This is captured by the word "sufficiently", which implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question.[295] The participating States should include those that had an opportunity or possibility of applying

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[290] See, for example, *Jurisdictional Immunities of the State* (footnote 255 above), at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Special Supreme Court prevailed over that of the Hellenic Supreme Court).

[291] *North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 74. A wide range of terms has been used to describe the requirement of generality, including by the International Court of Justice, without any real difference in meaning being implied.

[292] *Ibid.*, at p. 44, para. 77.

[293] See also draft conclusion 3, above.

[294] See also the judgment of 4 February 2016 of the Federal Court of Australia in *Ure v. The Commonwealth of Australia* [2016] FCAFC 8, para. 37 ("we would hesitate to say that it is impossible to demonstrate the existence of a rule of customary international [law] from a small number of instances of State practice. We would accept the less prescriptive proposition that as the number of instances of State practice decreases the task becomes more difficult").

[295] See, for example, 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law").

the alleged rule.[296] It is important that such States are representative of the various geographical regions and/or various interests at stake.

(4) In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule have participated in the practice.[297] It would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal States and major shipping States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. In many cases, all or virtually all States will be equally concerned.

(5) The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the *Fisheries case*, the International Court of Justice found that:

> "although the ten-mile rule has been adopted by certain States … other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."[298]

(6) In examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to:

> "precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear".[299]

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[296] A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law (*opinio juris*).

[297] The International Court of Justice has said that "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform", *North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 74.

[298] *Fisheries case* (see footnote 289 above), at p. 131. A chamber of the Court held in the *Gulf of Maine* case that where the practice demonstrates "that each specific case is, in the final analysis, different from all the others …. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 250 above), at p. 290, para. 81). See also, for example, *Colombian-Peruvian asylum case* (footnote 257 above), at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum … that it is not possible to discern in all this any constant and uniform usage … with regard to the alleged rule of unilateral and definitive qualification of the offence"); *Interpretation of the air transport services agreement between the United States of America and Italy*, Advisory Opinion of 17 July 1965, United Nations, *Reports of International Arbitral Awards*, vol. XVI (Sales No. E/F.69.V.1), pp. 75-108, at p. 100 ("It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law").

[299] *The Case of the S.S. "Lotus"* (see footnote 250 above), at p. 21. See also *North Sea Continental Shelf* (footnote 254 above), at p. 45, para. 79; Special Court for Sierra Leone, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Judgment (Appeals Chamber) of 28 May 2008, para. 406.

(7) At the same time, complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform; some inconsistencies and contradictions are thus not necessarily fatal to a finding of "a general practice". In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice held that:

> "It is not to be expected that in the practice of States the application of the rules in question should have been perfect …. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules."[300]

(8) When inconsistency takes the form of breaches of a rule, this does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation and/or expresses support for the rule. As the International Court of Justice observed:

> "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[301]

(9) Paragraph 2 refers to the time element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. While a long duration may result in more extensive relevant practice, time immemorial or a considerable or fixed duration of a general practice is not a condition for the existence of a customary rule.[302] The International Court of Justice confirmed this in the *North Sea Continental Shelf* cases, holding that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law".[303] As this passage makes clear, however, some time must elapse for a general practice to emerge; there is no such thing as "instant custom".

Part Four

Accepted as law (*opinio juris*)

Establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not suffice in order to identify a rule of customary international law. Part Four concerns the second constituent element of customary international law, sometimes referred to as the "subjective" or "psychological" element: in each case, it is also necessary to be satisfied that there exists among States an acceptance as law (*opinio juris*) as to the binding character of the practice in question.

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[300] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 98, para. 186.

[301] *Ibid.* See also, for example, *Prosecutor v. Sam Hinga Norman* (footnote 258 above), para. 51. The same is true when assessing a particular State's practice: see draft conclusion 7, above.

[302] In fields such as international space law or the law of the sea, for example, customary international law has on a number of occasions developed rapidly.

[303] *North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 74.

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Commentary

(1) Draft conclusion 9 seeks to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*).

(2) Paragraph 1 explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a conviction that it is permitted, required or prohibited by customary international law. It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation. As the International Court of Justice stressed in the *North Sea Continental Shelf* judgment:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[304]

(3) Acceptance as law (*opinio juris*) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience; if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified. Thus in the *Colombian-Peruvian asylum* case, the International Court of Justice declined to recognize the existence of a rule of customary international law where the alleged instances of practice were not shown to be, *inter alia*:

> "exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. … considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation".[305]

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[304] *Ibid.*, at para. 77; see also *ibid.*, at para. 76 (referring to the requirement that States "believed themselves to be applying a mandatory rule of customary international law").

[305] *Colombian-Peruvian asylum case* (see footnote 257 above), at pp. 277 and 286. See also *The Case of the S.S. "Lotus"* (footnote 250 above), at p. 28 ("Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand … there are other circumstances calculated to show that the

(4) Seeking to comply with a treaty obligation as a treaty obligation, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law, and practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law.[306] However, a State may recognize that it is bound by a certain obligation by force of both customary international law and treaty; but this would need to be proved. On the other hand, when States act in conformity with a treaty by which they are not bound, or apply conventional obligations in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law in the absence of any explanation to the contrary.

(5) Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it; they must be shown to have understood the practice as being in accordance with customary international law.[307] It is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad acceptance together with no or little objection that is required.[308]

(6) Paragraph 2 emphasizes that, without acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit. In other words, practice that States consider themselves legally free either to follow or to disregard does not contribute to or reflect customary international law (unless the rule to be identified itself provides for such a choice).[309] Not all observed regularities of international conduct bear legal significance; diplomatic courtesies, for example, such as the provision of red carpets for visiting heads of State, are not

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contrary is true"); *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at pp. 108-110, paras. 206-209.

[306] See, for example, *North Sea Continental Shelf* (footnote 254 above), at p. 43, para. 76. A particular difficulty may thus arise in ascertaining whether a rule of customary international law has emerged where a non-declaratory treaty has attracted virtually universal participation.

[307] See *Military and Paramilitary Activities in and against Nicaragua* (footnote 246 above), at p. 109, para. 207 ("Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'" (citing the *North Sea Continental Shelf* Judgment)).

[308] Thus, where "the members of the international community are profoundly divided" on the question of whether a certain practice is accompanied by acceptance as law (*opinio juris*), no such acceptance as law could be said to exist: see *Legality of the Threat or Use of Nuclear Weapons* (footnote 258 above), at p. 254, para. 67.

[309] In the *Right of Passage over Indian Territory*, the International Court of Justice thus observed, with respect to the passage of armed forces and armed police, that: "The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory* (see footnote 258 above), at pp. 42-43). In the *Jurisdictional Immunities of the State* case, the International Court of Justice similarly held, in seeking to determine the content of a rule of customary international law, that: "While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court" (*Jurisdictional Immunities of the State* (see footnote 255 above), at p. 123, para. 55). See also *North Sea Continental Shelf* (footnote 254 above), at pp. 43-44, para. 76.

accompanied by any sense of legal obligation and thus could not generate or attest to any legal duty or right to act accordingly.[310]

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Commentary

(1) Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be deduced. It reflects the fact that acceptance as law may be made known through various manifestations of State behaviour.

(2) Paragraph 1 states the general proposition that acceptance as law (*opinio juris*) may be reflected in a wide variety of forms. States may express their recognition (or rejection) of the existence of a rule of customary international law in many ways. Such conduct indicative of acceptance as law supporting an alleged rule encompasses, as the subsequent paragraphs make clear, both pronouncements and physical actions (as well as inaction) concerning the practice in question.

(3) Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*) including those most commonly resorted to for such purpose. Such evidence may also be useful in demonstrating a lack of acceptance as law. There is some common ground between the forms of evidence of acceptance as law and the forms of State practice; in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case[311]). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.

(4) Among the forms of evidence of acceptance as law (*opinio juris*), an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that it has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation. Such statements could be made, for example: in debates in multilateral settings; in introducing draft legislation before the legislature; as assertions made in written and oral pleadings before courts and tribunals; in protests characterizing the conduct of other States as unlawful; and in response to proposals for codification. They may be made individually or jointly with others. Similarly, the effect

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[310] The International Court of Justice observed that indeed: "There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" (*North Sea Continental Shelf* (see footnote 254 above), at p. 44, para. 77).

[311] See draft conclusion 3, above.

of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists.[312]

(5) The other forms of evidence listed in paragraph 2 may also be of particular assistance in ascertaining the legal position of States in relation to certain practices. Among these, the term "official publications" covers documents published in the name of a State, such as military manuals and official maps, in which acceptance as law (*opinio juris*) may be revealed. Published opinions of government legal advisers may likewise shed light on a State's legal position, though not if the State declined to follow the advice. Diplomatic correspondence may include, for example, circular notes to diplomatic missions, such as those on privileges and immunities. National legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law, particularly where it has been specified that it is mandated under or gives effect to customary international law. Decisions of national courts may also contain such statements when pronouncing upon questions of international law.

(6) Multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States with respect to the content of customary international law, when such matters are taken up and debated by States. Hence the reference to "treaty provisions" and to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference", whose potential utility in the identification of rules of customary international law is explored in greater detail in draft conclusions 11 and 12.

(7) Paragraph 3 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the *Fisheries case*, "[bear] witness to the fact that they did not consider … [a certain practice undertaken by others] to be contrary to international law".[313] Toleration of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in order to ensure that it does not derive from causes unrelated to the legality of the practice in question.[314] First, it is essential that a reaction to the practice in question would have been called for:[315] this may

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[312] At times the practice itself is accompanied by an express disavowal of legal obligation, such as when States pay compensation *ex gratia* for damage caused to foreign diplomatic property.

[313] *Fisheries case* (see footnote 289 above), at p. 139. See also *The Case of the S.S. "Lotus"* (footnote 250 above), at p. 29 ("the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law"); *Priebke, Erich s/ solicitud de extradición*, Case No. 16.063/94, Supreme Court of Justice of Argentina, Judgment of 2 November 1995, Vote of Judge Gustavo A. Bossert, at p. 40, para. 90.

[314] See also, more generally, *North Sea Continental Shelf* (footnote 254 above), at p. 27, para. 33.

[315] The International Court of Justice has observed, in a different context, that: "The absence of reaction may well amount to acquiescence …. That is to say, silence may also speak, but only if the conduct of the other State calls for a response" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks*

be the case, for example, where the practice is one that (directly or indirectly) affects — usually unfavourably — the interests or rights of the State failing or refusing to act.[316] Second, the reference to a State being "in a position to react" means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.

Part Five
Significance of certain materials for the identification of customary international law

Commentary

(1) Various materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of identifying the existence and content of rules of customary international law. These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and conferences, judicial decisions (of both international and national courts) and scholarly works. Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law and may offer precise formulations to frame and guide an inquiry into its two constituent elements. Part Five seeks to explain the potential significance of these materials, making clear that it is of critical importance to study carefully both the content of such materials and the context at the time when they were prepared.

(2) The Commission decided not to include at this stage a separate conclusion on the output of the International Law Commission. Such output does, however, merit special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals,[317] a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value; as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate from States to promote the progressive development of international law and its codification,[318] the thoroughness of its procedures (including the consideration of extensive surveys of State practice), and its close relationship with States as a subsidiary organ of the General Assembly (including receiving their oral and written comments as it proceeds with

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and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p. 12, at pp. 50-51, para. 121). See also *Dispute regarding Navigational and Related Rights* (footnote 266 above), at pp. 265-266, para. 141 ("For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant").

[316] It may well be that a certain practice would be seen as affecting all or virtually all States.

[317] See, for example, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 56, para. 169; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, International Criminal Tribunal for Rwanda, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber) of 13 December 2004, para. 518; *Dubai-Sharjah Border Arbitration* (1981), *International Law Reports*, vol. 91, pp. 543-701, at p. 575; 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 47.

[318] See the statute of the International Law Commission (1947), adopted by the General Assembly in resolution 174 (II) of 21 November 1947.

its work). The weight to be given to the Commission's determinations depends, however, on various factors, including sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output.[319]

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Commentary

(1) Draft conclusion 11 concerns the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law. The draft conclusion does not address conduct in connection with treaties as a form of practice, a matter covered in draft conclusion 6; nor does it directly concern the treaty-making process or draft treaty provisions, which may themselves give rise to State practice and evidence of acceptance as law (*opinio juris*) as indicated in draft conclusions 6 and 10.

(2) While treaties are, as such, binding only on the parties thereto, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[320] Their provisions (and the processes of their adoption and application) may shed light on the content of customary international law.[321] Clearly expressed treaty provisions may offer particularly convenient evidence as to the existence or content of rules of customary international law when they are found to be declaratory of such rules. The reference to a "rule set forth in a treaty" seeks to indicate that a rule may not necessarily be contained in a single treaty provision, but could be reflected by two or more provisions read

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[319] Once the General Assembly has taken action in relation to a final draft of the Commission, such as by commending and annexing it to a resolution, the output of the Commission may also fall to be considered under draft conclusion 12.

[320] *Continental Shelf* (see footnote 255 above), at pp. 29-30, para. 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"). Article 38 of the 1969 Vienna Convention refers to the possibility of "a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such".

[321] See *Jurisdictional Immunities of the State* (footnote 255 above), at p. 128, para. 66; "Ways and means for making the evidence of customary international law more readily available", *Yearbook … 1950*, vol. II, document A/1316, Part II, p. 368, para. 29 ("not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law").

together.[322] Either way, the words "may reflect" caution that, in and of themselves, treaties cannot create customary international law or conclusively attest to it.

(3) The extent of participation in a treaty may be an important factor in determining whether it corresponds to customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect.[323] But treaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States.[324]

(4) Paragraph 1 sets out three circumstances in which rules set forth in a treaty may be found to reflect customary international law, distinguished by the time when the rule of customary international law was (or began to be) formed. The words "if it is established that" make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty; in each case the existence of the rule must be confirmed by practice (and acceptance as law). It is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become customary international law.[325]

(5) Subparagraph (a) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law.[326] In inquiring whether this is the case with respect to an alleged rule of customary international law, regard should first be had to the treaty text, which may contain an express statement on the

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[322] It may also be the case that a single provision is only partly declaratory of customary international law.

[323] See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War, Ethiopia's Claim 4*, 1 July 2003, United Nations, *Reports of International Arbitral Awards*, vol. XXVI (Sales No. E/F.06.V.7), pp. 73-114, at pp. 86-87, para. 31 ("Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion" (footnote omitted)); *Prosecutor v. Sam Hinga Norman* (see footnote 258 above) at paras. 17-20 (referring, *inter alia*, to the "huge acceptance, the highest acceptance of all international conventions" as indicating that the relevant provisions of the Convention on the Rights of the Child had come to reflect customary international law); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 47, para. 94 ("The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject").

[324] See, for example, *Continental Shelf* (footnote 255 above), at p. 30, para. 27 ("it cannot be denied that the 1982 Convention [on the Law of the Sea — which was not then in force] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

[325] In the *North Sea Continental Shelf* cases, this consideration led to the disqualification of several of the invoked instances of State practice (*North Sea Continental Shelf* (see footnote 254 above), at p. 43, para. 76).

[326] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of the International Court of Justice, 3 February 2015, para. 87.

matter.[327] The fact that reservations are expressly permitted to a treaty provision may be significant, but does not necessarily indicate whether or not the provision reflects customary international law.[328] Such indications within the text are, however, rare, or tend to refer to the treaty in general rather than to specific rules contained therein;[329] in such a case, or when the treaty is silent, resort may be had to the treaty's preparatory work (*travaux préparatoires*),[330] including any statements by States in the course of the drafting process that may disclose an intention to codify an existing rule of customary international law. If it is found that the negotiating States had indeed considered that the rule in question was a rule of customary international law, this would be evidence of acceptance as law (*opinio juris*), which would carry greater weight in the identification of the customary rule the larger the number of negotiating States. There would, however, still remain a need to consider whether sufficiently widespread and representative, as well as consistent, instances of the relevant practice supported the rule; this is not only because the fact that the parties assert that the treaty is declaratory of existing law is (so far it concerns third parties) no more than one piece of evidence to this effect, but also because the customary rule underlying a treaty text may have changed or been superseded since the conclusion of the treaty. In other words, relevant practice will need to confirm, or exist in conjunction with, the *opinio juris*.

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[327] In the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaties Series*, vol. 78, No. 1021, p. 277), for example, the Parties "*confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law" (art. 1) (emphasis added); and the 1958 Geneva Convention on the High Seas contains the following preambular paragraph: "*Desiring* to codify the rules of international law relating to the high seas" (*ibid.*, vol. 450, No. 6465, at p. 82). A treaty may equally indicate that it embodies progressive development rather than codification; in the *Colombian-Peruvian asylum case*, for example, the International Court of Justice found that the preamble to the Montevideo Convention on Rights and duties of States of 1933 (League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19), which states that it modifies a previous convention (and the limited number of States that have ratified it), runs counter to the argument that the Convention "merely codified principles which were already recognized by … custom" (*Colombian-Peruvian asylum case* (see footnote 257 above), at p. 277).

[328] See also the Commission's Guide to Practice on Reservations to Treaties, guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and obligations under customary international law), *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1).

[329] The 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws (League of Nations, *Treaty Series*, vol. CLXXIX, No. 4137, p. 89), for example, provides that: "The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law" (art. 18). Sometimes a general reference is made to both codification and development: in the 1969 Vienna Convention, for example, the States parties express in the preamble their belief that "codification and progressive development of the law of treaties [are] achieved in the present Convention"; in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38 of 2 December 2004), the States parties consider in the preamble "that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law" and express their belief that the Convention "would contribute to the codification and development of international law and the harmonization of practice in this area".

[330] In examining in the *North Sea Continental Shelf* cases whether article 6 of the 1958 Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311) reflected customary international law when the Convention was drawn up, the International Court of Justice held that: "The status of the rule in the Convention therefore depends mainly on the processes that led the [International Law] Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule" (*North Sea Continental Shelf* (see footnote 254 above), at p. 38, para. 62). See also *Jurisdictional Immunities of the State* (footnote 255 above), at pp. 138-139, para. 89.

(6) Subparagraph (b) deals with the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. In other words, the treaty rule has consolidated and given further definition to a rule of customary international law that was only emerging at the time when the treaty was being drawn up, thereby later becoming reflective of it.[331] Here, too, establishing that this is indeed the case requires an evaluation of whether the treaty formulation has been accepted as law and does in fact find support in a general practice.[332]

(7) Subparagraph (c) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law.[333] This is a process that is not lightly to be regarded as having occurred. As the International Court of Justice explained in the *North Sea Continental Shelf* cases, for it to be established that a rule set forth in a treaty has produced the effect that a rule of customary international law has come into being:

> "It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law. … [A]n indispensable requirement would [then] be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[334]

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[331] Even where a treaty provision could not eventually be agreed, it remains possible that customary international law has later evolved "through the practice of States on the basis of the debates and near-agreements at the Conference [where a treaty was negotiated]": *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 23, para. 52.

[332] See, for example, *Continental Shelf* (footnote 255 above), at p. 33, para. 34 ("It is in the Court's view incontestable that … the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown *by the practice of States* to have become a part of customary law" (emphasis added)).

[333] As the International Court of Justice confirmed, "this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*North Sea Continental Shelf* (see footnote 254 above), at p. 41, para. 71). One example may be found in The Hague Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land: although these were prepared, according to the Convention, "to revise the general laws and customs of war" existing at that time (and thus did not codify existing customary international law), they later came to be regarded as reflecting customary international law (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 89).

[334] *North Sea Continental Shelf* (see footnote 254 above), at pp. 41-42 and 43, paras. 72 and 74 (cautioning, at para. 71, that "this result is not lightly to be regarded as having been attained"). See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 246 above), at p. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The

In other words, a general practice accepted as law (accompanied by *opinio juris*) "in the sense of the provision invoked" must be observed. Given that the concordant behaviour of parties to the treaty among themselves could presumably be attributed to the treaty obligation, rather than to acceptance of the rule in question as binding under customary international law, the practice of such parties in relation to non-parties to the treaty, and of non-parties in relation to parties or among themselves, will have particular value.

(8) Paragraph 2 seeks to caution that the existence of similar provisions in a considerable number of bilateral or other treaties, thus establishing similar rights and obligations for a broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from it.[335] Again, an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 12 concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. It provides that, while such resolutions, of themselves, can neither constitute rules of customary international law nor serve as conclusive evidence of their existence and content, they may sometimes have value in providing evidence of existing or emerging law.[336]

Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

[335] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary").

[336] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 258 above), at pp. 254-255, para 70; *SEDCO Incorporated v. National Iranian Oil Company and Iran*, second interlocutory award, Award No. ITL 59-129-3 of 27 March 1986, *International Law Reports*, vol. 84, pp. 483-592, at p. 526.

(2) As in draft conclusion 6, the term "resolutions" refers to all resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation[337] and whether or not they are legally binding. Special attention is paid in the present context to resolutions of the General Assembly, a plenary organ of near universal participation that may afford a convenient means to examine the collective opinions of its members. Resolutions adopted by organs or at conferences with more limited membership may also be relevant, although their weight in identifying a rule of (general) customary international law is likely to be less.

(3) Although the resolutions of organs of international organizations are acts of those organs, in the context of the present draft conclusion what matters is that they may reflect the collective expression of the views of States members of such organs: when they purport (explicitly or implicitly) to touch upon legal matters, they may afford an insight into the attitudes of their members respecting such matters. Much of what has been said of treaties in draft conclusion 11 applies to resolutions; however, unlike treaties, resolutions are normally not legally binding documents, for the most part do not seek to embody legal rights and obligations, and generally receive much less legal review than proposed treaty texts. Like treaties, resolutions cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law (accompanied by *opinio juris*).

(4) Paragraph 1 makes clear that resolutions adopted by international organizations or at intergovernmental conferences cannot independently constitute rules of customary international law. In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*). There is no "instant custom" arising out of such resolutions on their own account.

(5) Paragraph 2 states, first, that resolutions may nevertheless assist in the determination of rules of customary international law by providing evidence of their existence and content. As the International Court of Justice observed in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, resolutions "even if they are not binding … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[338] This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[339] Conversely, negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law, and thus that there is no rule.

(6) Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (*opinio juris*) from such

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[337] There is a wide range of designations, such as "declaration" or "declaration of principles".

[338] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 258 above), at pp. 254-255, para. 70 (referring to General Assembly resolutions).

[339] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award of 24 March 1982, *International Law Reports*, vol. 66, pp. 518-627, at pp. 601-602, para. 143.

resolutions must be done "with all due caution".[340] This is denoted by the word "may". In each case, a careful assessment of various factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law. As the International Court of Justice indicated in the *Legality of the Threat or Use of Nuclear Weapons* case:

> "it is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[341]

The precise wording used is the starting point in seeking to evaluate the legal significance of a resolution; reference to international law, and the choice (or avoidance) of particular terms in the text, including the preambular as well as the operative language, may be significant.[342] Also relevant are the debates and negotiations leading up to the adoption of the resolution and especially explanations of vote, explanations of position and similar statements given immediately before or after adoption.[343] The degree of support for the resolution (as may be observed in the size of the majority and number of the negative votes or abstentions) is critical. Differences of opinion expressed on aspects of a resolution may indicate that no general acceptance as law (*opinio juris*) exists, at least on those aspects, and resolutions opposed by a substantial number of States are unlikely to be regarded as reflecting customary international law.[344]

(7) Paragraph 2 further acknowledges that resolutions adopted by international organizations or at intergovernmental conferences, even when devoid of legal force of their own, may sometimes play an important role in the development of customary international law. This may be the case when, as with treaty provisions, a resolution (or a series of resolutions) provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms, or when it crystallizes an emerging rule.

(8) Paragraph 3, as a logical consequence of paragraphs 1 and 2, clarifies that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law. This follows from the indication that, for the existence of a rule the *opinio juris* of States, as evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States.[345] A provision of a resolution cannot be

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[340] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 99, para. 188.

[341] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 258 above), at p. 255, para. 70.

[342] In resolution 96 (I) of 11 December 1946, for example, the General Assembly "*Affirm[ed]* that genocide is a crime under international law", language that suggests that the paragraph is declaratory of existing customary international law.

[343] In the General Assembly, explanations of vote are often given upon adoption by a main committee, in which case they are not usually repeated in the plenary.

[344] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 258 above), at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons").

[345] See, for example, *KAING Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 194 ("The 1975 Declaration on Torture [resolution 3452 (XXX) of 9 December 1975,

evidence of a rule of customary international law if actual practice is absent, different or inconsistent.

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Commentary

(1) Draft conclusion 13 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law. It should be noted that decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as draft conclusions 6 and 10 indicate, they may rank as practice and/or evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means for the determination of rules of customary international law when they themselves investigate the existence and content of such rules.

(2) Draft conclusion 13 follows closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, according to which judicial decisions are a "subsidiary means" (*moyen auxiliaire*) for the determination of rules of international law, including rules of customary international law. The term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law, like treaties, customary international law or general principles of law. The use of the term "subsidiary means" is not intended to suggest that such decisions are not important in practice.

(3) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning of each decision (including the extent to which it is founded upon a close examination of evidence of an alleged general practice accepted as law) and on the reception of the decision by States and by other courts. Other considerations might, depending on the circumstances, include the composition of the court or tribunal (and the particular expertise of its members); the size of the majority by which the decision was adopted; and the conditions under which the court or tribunal operates/conducts its work. It needs to be remembered, moreover, that judicial pronouncements on the state of customary international law do not freeze the development

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Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time").

of the law; rules of customary international law may have evolved since the date of a particular decision.[346]

(4) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the United Nations Charter and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular authority as the only standing international court of general jurisdiction.[347] In addition to the International Court of Justice's predecessor, the Permanent Court of International Justice, the term "international courts and tribunals" includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Appellate Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law. The skills and the breadth of evidence usually at the disposal of international courts and tribunals lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(5) For the purposes of this draft conclusion, the term "decisions" includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal; but they need to be approached with caution since they may only reflect the viewpoint of the individual judge or set out points not accepted by the court or tribunal.

(6) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts).[348] The distinction between international and national courts is not always clear-cut; as used in these conclusions, the term "national courts" also applies to courts with an international composition operating within one or more domestic legal systems, such as hybrid courts and tribunals involving mixed national and international composition and jurisdiction.

(7) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. Judgments of international tribunals are generally accorded more weight than those of national courts for the present purpose, since the former are likely to have greater expertise in international law and are less likely to reflect a particular national perspective. Also, it has to be borne in mind that national courts operate within a particular legal system, which may incorporate international law

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[346] Decisions of international courts and tribunals thus cannot be said to be conclusive evidence for the identification of rules of international law in this respect either.

[347] Although there is no hierarchy of international courts and tribunals, decisions of the International Court of Justice are often regarded as persuasive by other courts and tribunals. See, for example, European Court of Human Rights, *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014, para. 198; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, *ITLOS Reports 1999*, p. 10, at paras. 133-134; *Japan — Taxes on Alcoholic Beverages*, WTO Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. D.

[348] On decisions of national courts being a subsidiary means for the determination of rules of customary international see also, for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, Case No. IT-96-21-T, Judgment of 16 November 1998, at para. 414.

only in a particular way and to a limited extent. Unlike international courts, national courts may lack international law expertise and may have reached their decisions without the benefit of hearing argument by States.[349]

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Commentary

(1) Draft conclusion 14 concerns the role of teachings (in French, *doctrine*) in the identification of rules of customary international law. Following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means (*moyen auxiliaire*) for determining rules of customary international law, that is to say, when ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). The term "teachings", often referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to in draft conclusion 13, writings are not themselves a source of customary international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that they may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law.

(3) There is a need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies; this is reflected in the words "may serve as". First, writers may aim not merely to record the state of the law as it is (*lex lata*) but also to advocate its development (*lex ferenda*). In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual positions of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential; the United States Supreme Court in the *Paquete Habana Case* referred to:

> "the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[350]

(4) The term "publicists", which comes from the Statute of the International Court of Justice, covers all those whose scholarly work may elucidate questions of international law. While most of these will in the nature of things be specialists in public international law, others are not excluded. The reference to "the most highly qualified" publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach

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[349] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II, document A/1316, Part II, p. 370, para. 53.

[350] *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), at p. 700. See also *The Case of the S.S. "Lotus"* (footnote 250 above), at pp. 26 and 31.

adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it. The reference to publicists "of the various nations" highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages.

(5) The products of international bodies engaged in the codification and development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (Institut de droit international) and the International Law Association, as well as international expert bodies in particular fields. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body and the reception of the output by States.

Part Six
Persistent objector

Part Six comprises a single draft conclusion on the persistent objector.

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Commentary

(1) Rules of customary international law, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[351] Nevertheless, when a State that has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, that rule is not opposable to it. This is sometimes referred to as the persistent objector "rule" or "doctrine" and not infrequently arises in connection with the identification of rules of customary international law.

(2) The persistent objector is to be distinguished from a situation where the objection of a substantial number of States to the formation of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law),[352] and its application is subject to stringent requirements.

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[351] *North Sea Continental Shelf* (see footnote 254 above), at pp. 38-39, para. 63. This is true of rules of "general" customary international law, as opposed to "particular" customary international law (see draft conclusion 16, below).

[352] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46 (1978), judgment of 13 December 1977, 2 BvM 1/76, No. 32, pp. 342-404, at pp. 388-389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the Norwegian *Fisheries case* (see footnote 289 above), p. 131); instead, the existence of a corresponding general rule of international law cannot at present be assumed").

(3) A State objecting to an emerging rule of customary international law by arguing against it or engaging in an alternative practice may adopt one or both of two stances: it may seek to prevent the rule from coming into being; and/or it may aim to ensure that, if it does emerge, the rule will not be opposable to it. An example would be the opposition of certain States to the emerging rule permitting the establishment of a maximum 12-mile territorial sea. Such States may have wished to consolidate a three-, four- or six-mile territorial sea as a general rule, but in any event were not prepared to have wider territorial seas enforced against them.[353] If a rule of customary international law is found to have emerged, the onus of establishing the right to benefit from persistent objector status lies with the objecting State.

(4) The persistent objector rule is quite frequently invoked and recognized, both in international and domestic case law[354] as well as in other contexts.[355] While there are differing views, the persistent objector rule is widely accepted by States and writers as well as by scientific bodies engaged in international law.[356]

(5) Paragraph 1 makes it clear that the objection must have been made while the rule in question was in the process of formation. The timeliness of the objection is critical: the State must express its opposition before a given practice has crystallized into a rule of customary international law and its position will be more assured if it did so at the earliest possible moment. While the line between objection and violation may not always be an easy one to draw, there is no such thing as a subsequent objector rule: once the rule has come into being, an objection will not avail a State wishing to exempt itself.

(6) If a State establishes itself as a persistent objector, the rule is inapplicable against it for so long as it maintains the objection; the expression "not opposable" is used in order to reflect the exceptional position of the persistent objector. As the paragraph further

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[353] In due course, and as part of an overall package on the law of the sea, States did not in fact maintain their objections. While the ability of effectively preserving a persistent objector status over time may sometimes prove difficult, this does not call into question the existence of the rule.

[354] See, for example, the *Fisheries case* (footnote 289 above), at p. 131; *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, paras. 48 and 49; *Sabeh El Leil v. France* [GC], no. 34869/05, European Court of Human Rights, 29 June 2011, para. 54; WTO Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted 21 November 2006, at p. 335, footnote 248; *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699; 1992 U.S. App., at p. 715, para. 54.

[355] See, for example, the intervention by Turkey in 1982 at the Third United Nations Conference on the Law of the Sea, document A/CONF.62/SR.189, p. 76, para. 150 (available at http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol17.html); United States Department of Defense, *Law of War Manual*, Office of General Counsel, Washington D.C., June 2015, at pp. 29-34, sect. 1.8 (Customary international law), in particular at p. 30, para. 1.8 ("Customary international law is generally binding on all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule") and p. 34, para. 1.8.4; *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), Reply of the Republic of Mauritius, vol. 1 (18 November 2013), p. 124, para. 5.11.

[356] The Commission itself recently referred to the rule in its Guide to Practice on Reservations to Treaties, where it stated that "a reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law" (see para. (7) of the commentary to guideline 3.1.5.3, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10/Add.1)).

indicates, once an objection is abandoned (as it may be at any time, expressly or otherwise), the State in question is bound by the rule.

(7) Paragraph 2 clarifies the stringent requirements that must be met for a State to establish and maintain persistent objector status *vis-à-vis* a rule of customary international law. In addition to being made before the practice crystallizes into a rule of law, the objection must be clearly expressed, meaning that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous.[357] There is, however, no requirement that the objection be made in a particular form. In particular, a clear verbal objection, either in written or oral form, as opposed to physical action, will suffice to preserve the legal position of the objecting State.

(8) The requirement that the objection be made known to other States means that the objection must be communicated internationally; it cannot simply be voiced internally. The onus is on the objecting State to ensure that the objection is indeed made known to other States.

(9) The requirement that the objection be maintained persistently applies both before and after the rule of customary international law has emerged. Assessing whether this requirement has been met needs to be done in a pragmatic manner, bearing in mind the circumstances of each case. The requirement signifies, first, that the objection should be reiterated when the circumstances are such that a restatement is called for (that is, in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection). This could be, for example, at a conference attended by the objecting State at which the rule is reaffirmed. States cannot, however, be expected to react on every occasion, especially where their position is already well known. Second, such repeated objections must be consistent overall, that is, without significant contradictions.

(10) The inclusion of draft conclusion 15 in the present draft conclusions is without prejudice to any issues of *jus cogens*.

Part Seven
Particular customary international law

Part Seven consists of a single draft conclusion, dealing with particular customary international law (sometimes referred to as "regional custom" or "special custom"). While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered, they can play a significant role in inter-State relations, accommodating differing interests and values peculiar to only some States.[358]

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

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[357] See, for example, *C v. Director of Immigration and another*, Hong Kong Court of Appeal [2011] HKCA 159, CACV 132-137/2008 (2011), at para. 68 ("Evidence of objection must be clear").

[358] It is not to be excluded that such rules may evolve, over time, into rules of general customary international law.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).

Commentary

(1) That rules of customary international law that are not general in nature may exist is undisputed. The jurisprudence of the International Court of Justice confirms this, having referred to, *inter alia*, customary international law "particular to the Inter-American Legal system"[359] or "limited in its impact to the African continent as it has previously been to Spanish America",[360] "a local custom"[361] and customary international law "of a regional nature".[362] Cases where the identification of such rules was considered include the *Colombian-Peruvian asylum case*[363] and the *Case concerning Right of Passage over Indian Territory*.[364] The term "particular customary international law" refers to these rules in contrast to rules of customary international law of general application. It is used in preference to "particular custom" to emphasize that the draft conclusion is concerned with rules of law, not mere customs or usages; there may indeed be "local customs" among States that do not amount to rules of international law.[365]

(2) Draft conclusion 16 has been placed at the end of the set of draft conclusions since the preceding draft conclusions generally apply also in respect of the determination of rules of particular customary international law, except as otherwise provided in the present draft conclusion. In particular, the two-element approach applies, as described in the present commentary.[366]

(3) Paragraph 1, definitional in nature, explains that particular customary international law applies only among a limited number of States. It is to be distinguished from general customary international law, that is, customary international law that in principle applies to all States. A rule of particular customary international law itself thus creates neither obligations nor rights for third States.[367]

(4) Rules of particular customary international law may apply among various types of groupings of States. Reference is often made to customary rules of a regional nature, such as those "peculiar to Latin-American States" (the institution of diplomatic asylum being a common example).[368] Particular customary international law may cover a smaller geographical area, such as a sub-region, or even bind as few as two States. Such a custom was at issue in the *Right of Passage* case, where the International Court of Justice held that:

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[359] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 246 above), at p. 105, para. 199.

[360] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21.

[361] *Case concerning rights of nationals of the United States of America in Morocco* (see footnote 268 above), at p. 200; *Case concerning Right of Passage over Indian Territory* (see footnote 258 above), at p. 39.

[362] *Dispute regarding Navigational and Related Rights* (footnote 266 above), at p. 233, para. 34.

[363] *Colombian-Peruvian asylum case* (see footnote 257 above).

[364] *Case concerning Right of Passage over Indian Territory* (see footnote 258 above).

[365] See also draft conclusion 9, para. 2, above.

[366] The International Court of Justice has treated particular customary international law as falling within Article 38, paragraph 1 (b), of its Statute: see *Colombian-Peruvian asylum case* (footnote 257 above), at p. 276.

[367] The position is similar to that set out in the provisions of the 1969 Vienna Convention concerning treaties and third States (Part III, sect. 4).

[368] *Colombian-Peruvian asylum case* (see footnote 257 above), at p. 276.

> "It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States."[369]

Cases in which assertions of such particular customary international law have been examined have concerned, for example, a right of access to enclaves in foreign territory;[370] a co-ownership (condominium) of historic waters by three coastal States;[371] a right to subsistence fishing by nationals inhabiting a river bank serving as a border between two riparian States;[372] a right of cross-border/international transit free from immigration formalities;[373] and an obligation to reach agreement in administering the generation of power on a river constituting a border between two States.[374]

(5) While a measure of geographical affinity usually exists between the States among which a rule of particular customary international law applies, that may not always be necessary. The expression "whether regional, local or other" is intended to acknowledge that although particular customary international law is mostly regional, sub-regional or local, there is no reason in principle why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise.

(6) Paragraph 2 addresses the substantive requirements for identifying a rule of particular customary international law. In essence, determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them as governing their relations. The International Court of Justice in the *Colombian-Peruvian asylum* case provided guidance on this matter, holding with respect to Colombia's argument as to the existence of a "regional or local custom particular to Latin-American States" that:

> "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'."[375]

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[369] *Case concerning Right of Passage over Indian Territory* (see footnote 258 above), at p. 39.

[370] *Ibid.*, p. 6.

[371] See the claim by Honduras in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992*, p. 351, at p. 597, para. 399.

[372] *Dispute regarding Navigational and Related Rights* (footnote 266 above), at pp. 265-266, paras. 140-144; see also Judge Sepúlveda-Amor's Separate Opinion, at pp. 278-282, paras. 20-36.

[373] *Nkondo v. Minister of Police and Another*, South African Supreme Court, 1980 (2) SA 894 (O), 7 March 1980, *International Law Reports*, vol. 82, pp. 358-375, at pp. 368-375 (Smuts J. holding that: "There was no evidence of long standing practice between the Republic of South Africa and Lesotho which had crystallized into a local customary right of transit free from immigration formalities" (at p. 359)).

[374] *Kraftwerk Reckingen AG v. Canton of Zurich and others*, Appeal Judgment, BGE 129 II 114, ILDC 346 (CH 2002), 10 October 2002, Switzerland, Federal Supreme Court [BGer]; Public Law Chamber II, para. 4.

[375] *Colombian-Peruvian asylum case* (see footnote 257 above), at pp. 276-277.

(7) The two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) thus also applies in the case of identifying rules of particular customary international law. In the case of particular customary international law, however, the practice must be general in the sense that it is a consistent practice "among the States concerned", that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.

Chapter VI
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

A. Introduction

64. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[376] At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[377]

65. From the sixty-second to the sixty-fourth session (2010-2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairperson, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[378] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[379] and the subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[380]

66. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[381] decided: (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[382]

67. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/660) and provisionally adopted five draft conclusions and the commentaries thereto.[383]

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[376] At its 2997th meeting, on 8 August 2008. See *Yearbook ... 2008*, vol. II (Part Two), para. 353; and for the syllabus of the topic, *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[377] *Yearbook ... 2009*, vol. II (Part Two), paras. 220-226.

[378] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344-354; and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[379] *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338-341; and *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230-231.

[380] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232-234. At the sixty-third session (2011), the Chairperson of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairperson presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairperson and agreed upon by the Study Group (*ibid.*, paras. 235-239).

[381] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[382] *Ibid.*, para. 227.

[383] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 33-39. The Commission provisionally adopted draft conclusion 1 (General rule and means of treaty interpretation); draft

68. At the sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/671) and provisionally adopted five draft conclusions and the commentaries thereto.[384]

69. At the sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (A/CN.4/683) and provisionally adopted one draft conclusion and the commentary thereto.[385]

B. Consideration of the topic at the present session

70. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/694), which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert treaty bodies (chap. II) and of decisions of domestic courts (chap. III) and which proposed, respectively, draft conclusions 12 and 13 on those issues. It also discussed the structure and scope of the draft conclusions (chap. IV), proposed the inclusion of a new draft conclusion 1a, and suggested a revision to draft conclusion 4, paragraph 3 (chap. V).

71. The Commission considered the report at its 3303rd to 3307th meetings, from 24 to 31 May 2016. At its 3307th meeting on 31 May 2016, the Commission decided to refer draft conclusions 1a and 12, as presented by the Special Rapporteur, to the Drafting Committee.

72. At its 3313th meeting, on 10 June 2016, the Commission considered the report of the Drafting Committee and adopted a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on first reading (see section C.1 below). At its 3335th to 3337th, 3340th and 3341st meetings, on 4, 5, 8 and 9 August 2016, the Commission adopted the commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (see section C.2 below).

73. At its 3341st meeting, on 9 August 2016, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions (sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

74. At its 3341st meeting, on 9 August 2016, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Georg Nolte, which enabled the Commission to bring to a successful conclusion its first reading of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

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conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time); draft conclusion 4 (Definition of subsequent agreement and subsequent practice); and draft conclusion 5 (Attribution of subsequent practice).

[384] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 70-76. The Commission provisionally adopted draft conclusion 6 (Identification of subsequent agreements and subsequent practice); draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation); draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation); draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty); and draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties).

[385] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 123-129. The Commission provisionally adopted draft conclusion 11 (Constituent instruments of international organizations).

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission

1. Text of the draft conclusions

75. The text of the draft conclusions adopted by the Commission on first reading is reproduced below.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1 [1a][386]
Introduction

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Part Two
Basic rules and definitions

Conclusion 2 [1]
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 3 [2]
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

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[386] The numbers of the draft conclusions, as previously adopted by the Commission, are indicated in square brackets.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A “subsequent agreement” as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A “subsequent practice” as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5
Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8 [3]
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 9 [8]
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 10 [9]
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four
Specific aspects

Conclusion 11 [10]
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States

Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

Conclusion 12 [11]
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Conclusion 13 [12]
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

2. Text of the draft conclusions and commentaries thereto

76. The text of the draft conclusions and commentaries thereto adopted by the Commission on first reading is reproduced below. This text comprises a consolidated version of the commentaries adopted so far by the Commission, including modifications and additions made to commentaries previously adopted and commentaries adopted at the sixty-eighth session of the Commission.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1 [1a]
Introduction

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Commentary

(1) The present draft conclusions aim at explaining the role that subsequent agreements and subsequent practice play in the interpretation of treaties. They are based on the Vienna Convention on the Law of Treaties of 1969 (hereinafter "1969 Vienna Convention").[387] The draft conclusions situate subsequent agreements and subsequent practice within the framework of the rules of the Vienna Convention on interpretation by identifying and elucidating relevant authorities and examples, and by addressing certain questions that may arise when applying those rules.[388]

(2) The draft conclusions do not address all conceivable circumstances in which subsequent agreements and subsequent practice may play a role in the interpretation of treaties. For example, one aspect not dealt with specifically is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations.[389] The draft conclusions also do not address the interpretation of rules adopted by an international organization, the identification of customary international law or general principles of law. This is without prejudice to the other means of interpretation under article 31, including paragraph 3 (c) according to which the interpretation of a treaty shall take into account any relevant rules of international law applicable in the relations between the parties.

(3) The draft conclusions aim to facilitate the work of those who are called on to interpret treaties. Apart from international courts and tribunals, they offer guidance for States, including their courts, and international organizations, as well as for non-State actors and all those called upon to interpret treaties.

Part Two
Basic rules and definitions

Conclusion 2 [1]
General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

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[387] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[388] As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

[389] See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention") (Vienna, 21 March 1986, not yet in force) (A/CONF.129/15); this does not exclude that some materials relating to such treaties, but which are also of general relevance are used in the commentaries.

> 2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
>
> 3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
>
> 4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
>
> 5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Commentary

(1) Draft conclusion 2 [1] situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention. The title "General rule and means of treaty interpretation" signals two points. First, article 31, as a whole, is the "general rule" of treaty interpretation.[390] Second, articles 31 and 32 together list a number of "means of interpretation", which shall (article 31) or may (article 32) be taken into account in the interpretation of treaties.[391]

Paragraph 1, first sentence — relationship between articles 31 and 32

(2) Paragraph 1 of draft conclusion 2 [1] emphasizes the interrelationship between articles 31 and 32, as well as the fact that these provisions, together, reflect customary international law. The reference to both articles 31 and 32 clarifies from the start the general context in which subsequent agreements and subsequent practice are addressed in the draft conclusions.

(3) Whereas article 31 sets forth the general rule and article 32 deals with supplementary means of interpretation, both rules[392] must be read together as they constitute an integrated framework for the interpretation of treaties. Article 32 includes a threshold between the primary means of interpretation according to article 31,[393] all of which are to be taken into account in the process of interpretation, and "supplementary means of interpretation" to which recourse may be had in order to confirm the meaning

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[390] Title of article 31 of the 1969 Vienna Convention.

[391] See the first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 8; M.E. Villiger, "The 1969 Vienna Convention on the law of treaties: 40 years after", *Recueil des cours de l'Académie de droit international de La Haye 2009* (hereinafter "*Recueil des cours* ..."), vol. 344, p. 9-133, at pp. 118-119 and 126-128.

[392] On the meaning of the term "rules" in this context: see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 217-220 (Commentary, introduction); R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford, Oxford University Press, 2015), pp. 36-38.

[393] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 223, commentary to draft article 28, para. (19); Waldock, third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 58-59, para. 21; M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours ... 1976-III*, vol. 151, pp. 1-114, at p. 78; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984), pp. 141-142; Villiger, "The 1969 Vienna Convention ..." (see footnote 391 above), pp. 127-128.

resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

Paragraph 1, second sentence — the Vienna Convention rules on interpretation and customary international law

(4) The second sentence of paragraph 1 of draft conclusion 2 [1] confirms that the rules enshrined in articles 31 and 32 reflect customary international law.[394] International courts and tribunals have acknowledged the customary character of these rules. This is true, in particular, for the International Court of Justice,[395] the International Tribunal for the Law of the Sea (ITLOS),[396] inter-State arbitrations,[397] the Appellate Body of the World Trade Organization (WTO),[398] the European Court of Human Rights,[399] the Inter-American Court

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[394] Y. le Bouthillier, "Commentary on article 32 of the Vienna Convention", in *The Vienna Conventions on the Law of Treaties: A Commentary*, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 841-865, at pp. 843-846, paras. 4-8; P. Daillier, M. Forteau and A. Pellet, *Droit international public* (Nguyen Quoc Din), 8th edition (Paris, L.G.D.J., 2009), at pp. 285-286; Gardiner, *Treaty Interpretation* (see footnote 392 above), at pp. 13-20; Villiger, "The 1969 Vienna Convention" (see footnote 391 above), pp. 132-133.

[395] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 46, para. 65 (1969 Vienna Convention, art. 31); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 109-110, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 645, para. 37; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 501, para. 99 (1969 Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1059, para. 18 (1969 Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 21-22, para. 41 (1969 Vienna Convention, art. 31, and without expressly mentioning art. 32 of the 1969 Vienna Convention but referring to the supplementary means of interpretation).

[396] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area*, case No. 17, Advisory Opinion, 1 February 2011, *ITLOS Reports ... 2011*, p. 10, at para. 57.

[397] *Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, United Nations, *Reports of International Arbitral Awards (UNRIAA)*, vol. XXVII (sales No. E/F.06.V.8), pp. 35-125, at para. 45 (1969 Vienna Convention, arts. 31-32).

[398] Art. 3, para. 2, of the WTO understanding on rules and procedures governing the settlement of disputes provides that "... it serves to ... to clarify the existing provisions of [the WTO-covered] agreements in accordance with customary rules of interpretation of public international law" (United Nations, *Treaties Series*, vol. 1869, No. 31874, p. 402), but does not specifically refer to arts. 31 and 32 of the 1969 Vienna Convention. However, the Appellate Body has consistently recognized that arts. 31 and 32 reflect rules of customary international law and has resorted to them by reference to art. 3.2 of the understanding on rules and procedures governing the settlement of disputes. See, for example, WTO Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, Section III, B (1969 Vienna Convention, art. 31, para 1); WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, Section D (1969 Vienna Convention, arts. 31-32). See also G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice:

of Human Rights,[400] the Court of Justice of the European Union,[401] and tribunals established by the International Centre for Settlement of Investment Disputes (ICSID)[402] under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[403] Hence, the rules contained in articles 31 and 32 apply as treaty law in relation to those States that are parties to the 1969 Vienna Convention and the treaties that fall within the scope of the Convention, and as customary international law between all States.

(5) The Commission also considered referring to article 33 of the 1969 Vienna Convention in draft conclusion 2 [1] and whether this provision also reflected customary international law. Article 33 may be relevant for draft conclusions on the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". A "subsequent agreement" under article 31, paragraph 3 (a), for example, could be formulated in two or more languages, and there could be questions regarding the relationship of any subsequent agreement to different language versions of the treaty itself. The Commission nevertheless decided not to address such questions.

(6) The Commission, in particular, considered whether the rules set forth in article 33 reflected customary international law. Some members thought that all the rules in article 33 reflected customary international law, while others wanted to leave open the possibility that only some, but not all, rules set forth in this provision qualified as such. The jurisprudence of international courts and tribunals has not yet fully addressed the question. The International Court of Justice and the WTO Appellate Body have considered parts of article 33 to reflect rules of customary international law. In *LaGrand*, the International Court of Justice recognized that paragraph 4 of article 33 reflects customary international law.[404] It is less clear whether the Court in the *Kasikili/Sedudu Island* case considered that paragraph 3 of article 33 reflected a customary rule.[405] The WTO Appellate Body has held that the rules in paragraphs 3 and 4 reflect customary law.[406] The Arbitral Tribunal in the *Young Loan*

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second report for the ILC Study Group on treaties over time", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210-240, at p. 215.

[399] *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, Series A no. 18, para. 29; *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, para. 58 (1969 Vienna Convention, art. 31); *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 65 (by implication, 1969 Vienna Convention, arts. 31-33).

[400] *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-Am. Ct. H.R. Series A No. 2, para. 19 (by implication, 1969 Vienna Convention, arts. 31-32); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs, Judgment)*, 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 19 (1969 Vienna Convention, art. 31, para. 1).

[401] *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, judgment of 25 February 2010, Case C-386/08, *European Court Reports 2010 I-01289*, paras. 41-43 (1969 Vienna Convention, art. 31).

[402] *National Grid plc v. Argentine Republic*, decision on jurisdiction (UNCITRAL), 20 June 2006, para. 51 (1969 Vienna Convention, arts. 31-32); *Canfor Corporation v. United States of America, and Tembec et al. v. United States of America, and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, para. 59 (1969 Vienna Convention, arts. 31-32).

[403] United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159.

[404] *LaGrand* (see footnote 395 above), p. 502, para. 101.

[405] *Kasikili/Sedudu Island* (see footnote 395 above), p. 1062, para. 25; the Court may have applied this provision only because the parties had not disagreed about its application.

[406] WTO Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US — Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 February 2004, para. 59 (1969 Vienna Convention, art. 33, para. 3); WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS267/AB/R,

Arbitration found that paragraph 1 "incorporated" a "principle".[407] ITLOS and the European Court of Human Rights have gone one step further and stated that article 33 as a whole reflects customary law.[408] Thus, there are significant indications in the case law that article 33, in its entirety, indeed reflects customary international law.

Paragraph 2 — article 31, paragraph 1

(7) Paragraph 2 of draft conclusion 2 [1] reproduces the text of article 31, paragraph 1, of the 1969 Vienna Convention given its importance for the topic. Article 31, paragraph 1, is the point of departure for any treaty interpretation according to the general rule contained in article 31 as a whole. This is intended to contribute to ensuring the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the present draft conclusions. The reiteration of article 31, paragraph 1, as a separate paragraph is not, however, meant to suggest that this paragraph, and the means of interpretation mentioned therein, possess a primacy in substance within the context of article 31 itself. All means of interpretation in article 31 are part of a single integrated rule.[409]

Paragraph 3 — article 31, paragraph 3

(8) Paragraph 3 reproduces the language of article 31, paragraph 3 (a) and (b), of the Vienna Convention, in order to situate subsequent agreements and subsequent practice, as the main focus of the topic, within the general legal framework of the interpretation of treaties. Accordingly, the chapeau of article 31, paragraph 3, "[t]here shall be taken into account, together with the context", is maintained in order to emphasize that the assessment of the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 are an integral part of the general rule of interpretation set forth in article 31.[410]

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adopted 21 March 2005, para. 424, where the Appellate Body applied and expressly referred to art. 33, para. 3, of the 1969 Vienna Convention without suggesting its customary status; WTO Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R and Corr.1, adopted 23 October 2002, para. 271 (1969 Vienna Convention, art. 33 (4)).

[407] *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, UNRIAA, vol. XIX (sales No. E/F.90.V.7), pp. 67-145, at p. 67, para. 17 or *International Law Reports*, vol. 59 (1980), p. 494, para. 17.

[408] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, case No. 17, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*; *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, Series A no. 18, para. 29; *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, para. 59; *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 65 (1969 Vienna Convention, arts. 31-33).

[409] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, para. (8). See, in detail, below para. (12) of the commentary to draft conclusion 2 [1], para. 5.

[410] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 220, para. (8); and G. Nolte, "Jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction relating to subsequent agreements and subsequent practice: introductory report for the ILC Study Group on treaties over time", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 169, at p. 177.

Paragraph 4 — other subsequent practice under article 32

(9) Paragraph 4 clarifies that subsequent practice in the application of the treaty, which does not meet all criteria of article 31, paragraph 3 (b), nevertheless falls within the scope of article 32. Article 32 includes a non-exhaustive list of supplementary means of interpretation.[411] Paragraph 4 borrows the language "recourse may be had" from article 32 to maintain the distinction between the mandatory character of the taking into account of the means of interpretation, which are referred to in article 31, and the discretionary nature of the use of the supplementary means of interpretation under article 32.

(10) In particular, subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation. This was stated by the Commission,[412] and has since been recognized by international courts and tribunals,[413] and in the literature[414] (see in more detail paragraphs (23) to (37) of the commentary to draft conclusion 4).

(11) The Commission did not, however, consider that subsequent practice, which is not "in the application of the treaty", should be dealt with, in the present draft conclusions, as a supplementary means of interpretation. Such practice may, however, under certain circumstances be a relevant supplementary means of interpretation as well.[415] But such practice is beyond what the Commission now addresses under the present topic, except insofar as it may contribute to "assessing" relevant subsequent practice in the application of a treaty (see draft conclusion 5 and accompanying commentary). Thus, paragraph 4 of draft conclusion 2 [1] requires that any subsequent practice be "in the application of the treaty", as does paragraph 3 of draft conclusion 4, which defines "other 'subsequent practice'".

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[411] Yasseen, "L'interprétation des traités ..." (see footnote 393 above), at p. 79.

[412] *Yearbook ... 1964*, vol. II, document A/5809, pp. 203-204, commentary to draft article 69, para. (13).

[413] *Kasikili/Sedudu Island* (see footnote 395 above), p. 1096, paras. 79-80; *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 79-81; *Hilaire, Constantine and Benjamin et al.* (see footnote 400 above), para. 92; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, provisional measures, order of 27 August 1999, *ITLOS Reports ... 1999*, p. 280, at para. 50; WTO Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment* (*EC — Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 90; see also WTO Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements (US — COOL)*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 452.

[414] Yasseen, "L'interprétation des traités ..." (see footnote 393 above), at p. 52 ("... la Convention de Vienne ne retient pas comme élément de la règle générale d'interprétation la pratique ultérieure en général, mais une pratique ultérieure spécifique, à savoir *une pratique ultérieure non seulement concordante, mais également commune à toutes les parties*. ... *Ce qui reste de la pratique ultérieure peut être un moyen complémentaire d'interprétation, selon l'article 32 de la Convention de Vienne*") (emphasis added); Sinclair, *The Vienna Convention* ... (see footnote 393 above), at p. 138: "... paragraph 3 (b) of [a]rticle 31 of the Convention [covers] ... only a specific form of subsequent practice — that is to say, *concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation with the meaning of [a]rticle 32 of the Convention*" (emphasis added); S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the law of treaties" in *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern, in honour of his 80th birthday*, G. Hafner and others, eds. (The Hague, Kluwer Law International, 1998), p. 721, at p. 726; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff, 2009), pp. 431-432.

[415] L. Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 53-63, at pp. 59-62.

Paragraph 5 — "a single combined operation"

(12) The Commission considered it important to complete draft conclusion 2 [1] by emphasizing in paragraph 5[416] that, notwithstanding the structure of draft conclusion 2 [1], moving from the general to the more specific, the process of interpretation is a "single combined operation", which requires that "appropriate emphasis" be placed on various means of interpretation.[417] The expression "single combined operation" is drawn from the Commission's commentary to the 1966 draft articles on the law of treaties.[418] There the Commission also stated that it intended "to emphasize that the process of interpretation is a unity".[419]

(13) Paragraph 5 of draft conclusion 2 [1] also explains that appropriate emphasis must be placed, in the course of the process of interpretation as a "single combined operation", on the various means of interpretation, which are referred to in articles 31 and 32 of the 1969 Vienna Convention. The Commission did not, however, consider it necessary to include a reference, by way of example, to one or more specific means of interpretation in the text of paragraph 5 of draft conclusion 2 [1].[420] This avoids a possible misunderstanding that any one of the different means of interpretation has priority over others, regardless of the specific treaty provision or the case concerned.

(14) Paragraph 5 uses the term "means of interpretation". This term captures not only the "supplementary means of interpretation", which are referred to in article 32, but also the elements mentioned in article 31.[421] Whereas the Commission, in its commentary on the draft articles on the law of treaties, sometimes used the terms "means of interpretation" and "elements of interpretation" interchangeably, for the purpose of the present topic the Commission retained the term "means of interpretation" because it also describes their function in the process of interpretation as a tool or an instrument.[422] The term "means" does not set apart from each other the different elements, which are mentioned in articles 31 and 32. It rather indicates that these means each have a function in the process of interpretation, which is a "single", and at the same time a "combined", operation.[423] Just as courts typically begin their reasoning by looking at the terms of the treaty, and then continue, in an interactive process,[424] to analyse those terms in their context and in the light of the object and purpose of the treaty,[425] the precise relevance of different means of

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[416] A/CN.4/660, para. 64; and Nolte, "Jurisprudence of the International Court of Justice ..." (see footnote 410 above), at pp. 171 and 177.

[417] On the different function of subsequent agreements and subsequent practice in relation to other means of interpretation, see A/CN.4/660, paras. 42-57; and Nolte, "Jurisprudence of the International Court of Justice ..." (see footnote 410 above), at p. 183.

[418] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, para. (8).

[419] *Ibid.*

[420] This had been proposed by the Special Rapporteur in his first report, see A/CN.4/660, para. 28: "Draft conclusion 1 (General rule and means of treaty interpretation) ... The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned." See also the analysis in the first report (*ibid.*, paras. 8-27).

[421] See also above commentary to draft conclusion 2 [1], para. (1); and Villiger, "The 1969 Vienna Convention ... "(see footnote 391 above), p. 129; Daillier, Forteau and Pellet, *Droit international public* (see footnote 394 above), at pp. 284-289.

[422] Provisional summary record of the 3172nd meeting, 31 May 2013 (A/CN.4/SR.3172), p. 4.

[423] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, para. (8).

[424] *Ibid.*

[425] *Ibid.*, p. 219, para. (6). See also Yasseen, "L'interprétation des traités ..." (footnote 393 above), at p. 58; Sinclair, *The Vienna Convention* ... (footnote 393 above), at p. 130; J. Klabbers, "Treaties, object

interpretation must first be identified in any case of treaty interpretation before they can be "thrown into the crucible"[426] in order to arrive at a proper interpretation, by giving them appropriate weight in relation to each other.

(15) The obligation to place "appropriate emphasis on the various means of interpretation" may, in the course of the interpretation of a treaty in specific cases, result in a different emphasis on the various means of interpretation depending on the treaty or on the treaty provisions concerned.[427] This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation. What guides the interpretation is the evaluation by the interpreter, which consists in identifying the relevance of different means of interpretation in a specific case and in determining their interaction with the other means of interpretation in this case by placing a proper emphasis on them in good faith, as required by the rule to be applied.[428] This evaluation should include, if possible and practicable, consideration of relevant prior assessments and decisions in the same and possibly also in other relevant areas.[429]

(16) The Commission debated whether it would be appropriate to refer, in draft conclusion 2 [1], to the "nature" of the treaty as a factor that would typically be relevant in determining whether more or less weight should be given to certain means of interpretation.[430] Some members considered that the subject matter of a treaty (for example, whether provisions concern purely economic matters or rather address the human rights of individuals; and whether the rules of a treaty are more technical or more value-oriented) as well as its basic structure and function (for example, whether provisions are more reciprocal in nature or intended more to protect a common good) may affect its interpretation. They indicated that the jurisprudence of different international courts and

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and purpose", *Max Planck Encyclopedia on Public International Law* (www.mpepil.com), para. 7; Villiger, *Commentary* ... (see footnote 414 above), at p. 427, para. 11; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1988*, p. 69, at p. 89, paras. 45-46; *Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (sales No. E/F.80.V.7), pp. 3-413, at pp. 32-35, para. 39.

[426] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 220.

[427] Draft conclusion 1, para. 2, as proposed in document A/CN.4/660, at para. 28, and, generally, paras. 10-27.

[428] Decisions of domestic courts have not been uniform as regards the relative weight that subsequent agreements and subsequent practice possess in the process of treaty interpretation, see United Kingdom of Great Britain and Northern Ireland, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47-48 (Lord Steyn); *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para. 31 (Lord Steyn). United States of America, Supreme Court: *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), pp. 183-185; *O'Connor v. United States*, 479 U.S. 27 (1986), pp. 31-32; *United States v. Stuart*, 489 U.S. 353 (1989), where a dissenting judge (Justice Scalia) criticized the majority of the Court for relying on "[t]he practice of the treaty signatories", which, according to him, need not be consulted, since when the "Treaty's language resolves the issue presented, there is no necessity of looking further", at p. 371. Switzerland: Federal Administrative Court, judgment of 21 January 2010, BVGE 2010/7, para 3.7.11; Federal Supreme Court, *A v. B*, appeal judgment of 8 April 2004, No. 4C 140/2003, BGE, vol. 130 III, p. 430, at p. 439.

[429] The first report (A/CN.4/660) refers to the jurisprudence of different international courts and tribunals as examples of how the weight of a means in an interpretation exercise is to be determined in specific cases and demonstrates how given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty.

[430] Draft conclusion 1, para. 2, as proposed in the first report (A/CN.4/660), para. 28, and analysis at paras. 8-28.

tribunals suggested that this is the case.[431] It was also mentioned that the concept of the "nature" of a treaty is not alien to the 1969 Vienna Convention (see, for example, article 56, paragraph 1 (a))[432] and that the concept of the "nature" of the treaty and/or of treaty provisions had been included in other work of the Commission, in particular on the topic of the effects of armed conflicts on treaties.[433] Other members, however, considered that the draft conclusion should not refer to the "nature" of the treaty in order to preserve the unity of the interpretation process and to avoid any categorization of treaties. The point was also made that the notion of the "nature of the treaty" was unclear and that it would be difficult to distinguish it from the object and purpose of the treaty.[434] The Commission ultimately decided to leave the question open and to make no reference in draft conclusion 2 [1] to the nature of the treaty for the time being.

Conclusion 3 [2]

Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Commentary

(1) By characterizing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention as "authentic means of interpretation", the Commission indicates the reason why those means are significant for

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[431] WTO Panels and the Appellate Body, for example, seem to emphasize more the terms of the respective WTO-covered agreement (for example, WTO Appellate Body, *Brazil — Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45), whereas the European Court of Human Rights and the Inter-American Court of Human Rights highlight the character of the Convention as a human rights treaty (for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 111; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. Series A No. 16, para. 58); see also *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), pp. 281-282, and Nolte, "Jurisprudence under special regimes …" (see footnote 398 above), p. 210, at pp. 216, 244-246, 249-262 and 270-275.

[432] M. Forteau, "Les techniques interprétatives de la Cour internationale de Justice", *Revue générale de droit international public*, vol. 115 (2011), p. 399, at pp. 406-407 and 416; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, Separate Opinion of Judge Dillard, p. 150, at p. 154, at footnote 1.

[433] Articles on the effects of armed conflicts on treaties (art. 6 (a)), General Assembly resolution 66/99 of 9 December 2011, annex; see also the guide to practice on reservations to treaties, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1); guideline 4.2.5 refers to the nature of obligations of the treaty, rather than the nature of the treaty as such.

[434] According to the commentary to guideline 4.2.5 of the guide to practice on reservations to treaties, it is difficult to distinguish between the nature of treaty obligations and the object and purpose of the treaty (guide to practice on reservations to treaties, commentary to guideline 4.2.5, para. (3), in *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1)). On the other hand, art. 6 of the articles on the effects of armed conflicts on treaties suggests "a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of the parties to the treaty", *ibid.*, commentary to draft article 6, para. (3).

the interpretation of treaties.[435] The Commission thereby follows its 1966 commentary on the draft articles on the law of treaties, which described subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" and which underlined that:

> "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[436]

(2) Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are, however, not the only "authentic means of interpretation". As the Commission has explained:

> "… the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, … making the ordinary meaning of the terms, the context of the treaty, its objects and purposes, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty".[437]

The term "authentic" thus refers to different forms of "objective evidence" or "proof" of conduct of the parties, which reflects the "common understanding of the parties" as to the meaning of the treaty.

(3) By describing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic" means of interpretation, the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The 1969 Vienna Convention thereby accords the parties to a treaty a role that may be uncommon for the interpretation of legal instruments in some domestic legal systems.

(4) The character of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect. According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only "be taken into account" in the interpretation of a treaty, which consists of a "single combined operation" with no hierarchy among the means of interpretation that are referred to in article 31.[438] For this reason, and contrary to the view

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[435] See R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th edition, vol. 1 (Harlow, Longman, 1992), p. 1268, para. 630; G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951-4: treaty interpretation and certain other treaty points", *British Yearbook of International Law 1957*, vol. 33, pp. 203-293, at pp. 223-225; WTO Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft (second complaint) (US — Large Civil Aircraft (2nd Complaint))*, WT/DS353/R, adopted 23 March 2012, para. 7.953.

[436] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (15).

[437] *Yearbook … 1964*, vol. II, document A/5809, pp. 204-205, para. (15); see also *ibid.*, pp. 203-204, para. 13: "Paragraph 3 specifies as *further* authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation" (emphasis added); on the other hand, Waldock explained in his third report that "… *travaux préparatoires* are not, as such, an authentic means of interpretation". See *ibid.*, document A/CN.4/167 and Add.1-3, pp. 58-59, para. (21).

[438] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, paras. (8) and (9).

of some commentators,[439] subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily conclusive or legally binding.[440] Thus, when the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[441] it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.

(5) This does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty. The Special Rapporteur on the law of treaties, Sir Humphrey Waldock, stated in his third report that it may be difficult to distinguish subsequent practice of the parties under what became article 31, paragraph 3 (a) and (b) — which is only to be taken into account, among other means, in the process of interpretation — and a later agreement that the parties consider to be binding:

> "Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, *at any rate* when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement."[442] (emphasis added)

Whereas Waldock's original view that (simple) agreed subsequent practice "would appear to be decisive of the meaning" was ultimately not adopted in the 1969 Vienna Convention, subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them". It is, however, always possible that provisions of domestic law prohibit the Government of a State from arriving at a binding agreement in such cases without satisfying certain — mostly procedural — requirements under its constitution.[443]

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[439] M.E. Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission", in *The Law of Treaties beyond the Vienna Convention*, E. Cannizzaro, ed. (Oxford, Oxford University Press, 2011), pp. 105-122, at p. 111; Gardiner, *Treaty Interpretation* (see footnote 392 above), at p. 34; O. Dörr, "Article 31, general rule of interpretation", in *Vienna Convention on the Law of Treaties. A commentary*, O. Dörr and K. Schmalenbach, eds. (Berlin, Springer, 2012), pp. 521-570, at pp. 553-554, paras. 72-75; K. Skubiszewski, "Remarks on the interpretation of the United Nations Charter", in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte — Festschrift für Hermann Mosler*, R. Bernhardt and others, eds. (Berlin, Springer, 1983), pp. 891-902, at p. 898.

[440] H. Fox, "Article 31 (3) (a) and (b) of the Vienna Convention and the *Kasikili Sedudu Island* Case", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, M. Fitzmaurice, O. Elias and P. Merkouris, eds. (Leiden, Martinus Nijhoff, 2010), pp. 59-74, at pp. 61-62; A. Chanaki, *L'adaptation des traités dans le temps* (Brussels, Bruylant, 2013), pp. 313-315; M. Benatar, "From probative value to authentic interpretation: the legal effects of interpretative declarations", *Revue belge de droit international*, vol. 44 (2011), pp. 170-195, at pp. 194-195; cautious: J.M. Sorel and B. Eveno, "1969 Vienna Convention, Article 31: General rule of interpretation", in Corten and Klein, *The Vienna Conventions* ... (see footnote 394 above), pp. 804-837, at p. 825, paras. 42-43; see also C. Nolte, "Subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 307-385, at p. 375, para. 16.4.3.

[441] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[442] *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, p. 60, para. (25).

(6) The possibility of arriving at a binding subsequent interpretative agreement by the parties is particularly clear in cases in which the treaty itself so provides. Article 1131, paragraph 2, of the North American Free Trade Agreement (NAFTA), for example, provides that: "An interpretation by the [inter-governmental] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[444] The existence of such a special procedure or an agreement regarding the authoritative interpretation of a treaty that the parties consider binding may or may not preclude additional recourse to subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention.[445]

(7) The Commission has continued to use the term "authentic means of interpretation" in order to describe the not necessarily conclusive, but more or less authoritative, character of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b). The Commission has not employed the terms "authentic interpretation" or "authoritative interpretation" in draft conclusion 3 [2] since these concepts are often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty.[446]

(8) Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation.[447] They have, however, not always been consistent regarding the legal consequences that this characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain

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[443] See, for example, Germany, Federal Fiscal Court, BFHE, vol. 181, p. 158, at p. 161; and *ibid.*, vol. 219, p. 518 *et seq.*, at pp. 527-528.

[444] North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (1992) (Washington, D.C., United States Government Printing Office, 1993).

[445] This question will be explored in more detail at a later stage of the work on the topic. See also: the Marrakesh Agreement establishing the World Trade Organization (1994), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3, art. IX, para. 2; WTO Appellate Body Report, *European Communities — Custom Classification of Frozen Boneless Chicken Cuts (EC — Chicken Cuts)*, WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 273; WTO Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador (EC — Bananas III)*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU and Corr.1, adopted 11 December 2008, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, paras. 383 and 390.

[446] See, for example, *Methanex Corporation v. United States of America*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 3 August 2005, Part II, chap. H, para. 23 (with reference to Jennings and Watts, see footnote 435 above), p. 1268, para. 630); Gardiner, *Treaty Interpretation* (see footnote 392 above), at p. 34; U. Linderfalk, *On the Interpretation of Treaties* (Dordrecht, Springer, 2007), p. 153; Skubiszewski, "Remarks on the interpretation of the United Nations Charter" (see footnote 439 above), at p. 898; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest, Akadémiai Kiadó, 1973), p. 43; see also Nolte, "Jurisprudence under special regimes ... (see footnote 398 above), p. 210, at p. 240, para. 4.5.

[447] Switzerland Federal Supreme Court: *A v. B*, appeal judgment of 8 April 2004, No. 4C.140/2003, BGE, vol. 130 III, p. 430, at p. 439 (where the Court speaks of the parties as being "masters of the treaty" ("Herren der Verträge"); judgment of 12 September 2012, No. 2C_743/2011, BGE, vol. 138 II, p. 524, at pp. 527-528. Germany, Federal Constitutional Court, BVerfGE, vol. 90, p. 286, at p. 362. See also India, Supreme Court, *Godhra Electricity Co. Ltd. and Another v. The State of Gujarat and Another* [1975] AIR 32. Available from http://indiankanoon.org/doc/737188 (accessed 8 June 2016).

binding effects,[448] others have rightly emphasized that article 31, paragraph 3, only requires that subsequent agreements and subsequent practice "be taken into account".[449]

(9) The term "authentic means of interpretation" encompasses a factual and a legal element. The factual element is indicated by the expression "objective evidence", whereas the legal element is contained in the concept of "understanding of the parties". Accordingly, the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[450] and subsequently stated that subsequent practice "similarly … constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[451] Given the character of treaties as embodiments of the common will of their parties, "objective evidence" of the "understanding of the parties" possesses considerable authority as a means of interpretation.[452]

(10) The distinction between any "subsequent agreement" (article 31, paragraph 3 (a)) and "subsequent practice … which establishes the agreement of the parties" (article 31, paragraph 3 (b)) does not denote a difference concerning their authentic character.[453] The Commission rather considers that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[454] Thus, the difference between a "subsequent agreement between the parties" and a "subsequent practice … which establishes the agreement of the parties" lies in the manner of establishing the agreement of the parties regarding the interpretation of a treaty, with the difference being in the greater ease with which an agreement is established.[455]

(11) Subsequent agreements and subsequent practice as authentic means of treaty interpretation are not to be confused with interpretations of treaties by international courts, tribunals or expert treaty bodies in specific cases. Subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation because they are expressions of the understanding of the treaty by the States parties themselves. The authority of international courts, tribunals and expert treaty bodies rather derives from other sources, most often from the treaty that is to be interpreted. Judgments and other pronouncements of international courts, tribunals and expert treaty bodies, however, may be indirectly relevant for the identification of subsequent agreements and

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[448] Germany, Federal Fiscal Court, BFHE, vol. 215, p. 237, at p. 241; *ibid.*, vol. 181, p. 158, at p. 161.

[449] New Zealand, Court of Appeal, *Zaoui v. Attorney-General (No. 2)* [2005] 1 NZLR 690, para. 130; Hong Kong, China, Court of Final Appeal, *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKLRD 315, 354; Austria, Supreme Administrative Court, VwGH, judgment of 30 March 2006, 2002/15/0098, 2, 5.

[450] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[451] *Ibid.*, para. (15).

[452] Gardiner, *Treaty Interpretation* (see footnote 392 above), at pp. 34 and 414-415; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), at pp. 152-153.

[453] A/CN.4/660, para. 69.

[454] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, para. (15); see also W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (Berlin, Springer, 1983), p. 294.

[455] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1087, para. 63, see also below draft conclusion 4 and the commentary thereto.

subsequent practice as authentic means of interpretation if they refer to, reflect or trigger such subsequent agreements and practice of the parties themselves.[456]

(12) Draft conclusions 2 [1] and 4 distinguish between "subsequent practice" establishing the agreement of the parties under article 31, paragraph 3 (b), of the 1969 Vienna Convention, on the one hand, and other subsequent practice (in a broad sense) by one or more, but not all, parties to the treaty that may be relevant as a supplementary means of interpretation under article 32.[457] Such "other" subsequent interpretative practice that does not establish the agreement of all the parties cannot constitute an "authentic" interpretation of a treaty by all its parties and thus will not possess the same weight for the purpose of interpretation.[458]

(13) The last part of draft conclusion 3 [2] makes it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation should occur as part of the application of the general rule of treaty interpretation reflected in article 31 of the 1969 Vienna Convention.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A "subsequent agreement" as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A "subsequent practice" as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Commentary

General aspects

(1) Draft conclusion 4 defines the three different "subsequent" means of treaty interpretation that are mentioned in draft conclusion 2 [1], paragraphs 3 and 4, namely "subsequent agreement" under article 31, paragraph 3 (a), "subsequent practice" under article 31, paragraph 3 (b), and other "subsequent practice" under article 32.

(2) In all three cases, the term "subsequent" refers to acts occurring "after the conclusion of a treaty".[459] This point in time is often earlier than the moment when the treaty enters into force (article 24). Various provisions of the 1969 Vienna Convention (for example, article 18) show that a treaty may be "concluded" before its actual entry into force.[460] For the purposes of the present topic, "conclusion" is whenever the text of the

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[456] See below draft conclusion 12 [11] and Nolte, "Subsequent agreements and subsequent practice of States ..." (footnote 440 above), p. 307, at pp. 381 *et seq.*, para. 17.3.1.

[457] See below in particular paras. (23) to (37) of the commentary to draft conclusion 4, para. 3.

[458] See below also para. (35) of the commentary to draft conclusion 4, para. 3.

[459] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[460] See J.L. Brierly, second report on the law of treaties, *Yearbook ... 1951*, vol. II, document A/CN.4/43, pp. 70 *et seq.*; and G.G. Fitzmaurice, first report on the law of treaties, *Yearbook ... 1956*, vol. II,

treaty has been established as definite. It is after conclusion, not just after entry into force, of a treaty when subsequent agreements and subsequent practice can occur. Indeed, it is difficult to identify a reason why an agreement or practice that takes place between the moment when the text of a treaty has been established as definite and the entry into force of that treaty should not be relevant for the purpose of interpretation.[461]

(3) Article 31, paragraph 2, of the 1969 Vienna Convention provides that the "context" of the treaty includes certain "agreements" and "instruments"[462] that "are made in connection with the conclusion of the treaty". The phrase "in connection with the conclusion of the treaty" should be understood as including agreements and instruments that are made in a close temporal and contextual relation with the conclusion of the treaty.[463] If they are made after this period, then such "agreements" and agreed upon "instruments" constitute "subsequent agreements" or subsequent practice under article 31, paragraph 3.[464]

Paragraph 1 — definition of "subsequent agreement" under article 31, paragraph 3 (a)

(4) Paragraph 1 of draft conclusion 4 provides the definition of "subsequent agreement" under article 31, paragraph 3 (a).

(5) Article 31, paragraph 3 (a), uses the term "subsequent agreement" and not the term "subsequent treaty". A "subsequent agreement" is, however, not necessarily less formal than a "treaty". Whereas a treaty within the meaning of the 1969 Vienna Convention must be in written form (article 2, paragraph 1 (a)), the customary international law on treaties knows no such requirement.[465] The term "agreement" in the 1969 Vienna Convention[466] and in customary international law does not imply any particular degree of formality. Article 39 of the 1969 Vienna Convention, which lays down the general rule according to which: "[a] treaty may be amended by agreement between the parties", has been explained by the Commission to mean that: "An amending agreement may take whatever form the parties to

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document A/CN.4/101, p. 112; see also S. Rosenne, "Treaties, conclusion and entry into force", in *Encyclopedia of Public International Law*, vol. 7, R. Bernhardt, ed. (Amsterdam, North Holland, 2000), p. 465 ("[s]trictly speaking it is the negotiation that is concluded through a treaty"); Villiger, *Commentary* ... (see footnote 414 above), at pp. 78-80, paras. 9-14.

[461] See, for example, Declaration on the European Stability Mechanism, agreed on by the Contracting Parties to the Treaty Establishing the Stability Mechanism, 27 September 2012.

[462] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (13); the German Federal Constitutional Court has held that this term may include unilateral declarations if the other party did not object to them, see German Federal Constitutional Court, *BVerfGE*, vol. 40, p. 141, at p. 176; see, generally, Gardiner, *Treaty Interpretation* (footnote 392 above), at pp. 240-242.

[463] Yasseen, "L'interprétation des traités ..." (see footnote 393 above), at p. 38; Jennings and Watts, *Oppenheim's International Law* (see footnote 435 above), p. 1274, para. 632 ("... but, on the other hand, too long a lapse of time between the treaty and the additional agreement might prevent it being regarded as made in connection with 'the conclusion of' the treaty").

[464] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14); see also Villiger, *Commentary* ... (above footnote 414), at p. 431, paras. 20-21; see also K.J. Heller, "The uncertain legal status of the aggression understandings", *Journal of International Criminal Justice*, vol. 10 (2012), p. 229-248, at p. 237.

[465] Villiger, *Commentary* ... (see footnote 414 above), at p. 80, para. 15; P. Gautier, "Commentary on article 2 of the Vienna Convention", in Corten and Klein, *The Vienna Conventions* ... (see footnote 394 above), vol. II, at pp. 38-40, paras. 14-18; J. Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International, 1996), pp. 49-50; see also A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (1986), pp. 787-812, at pp. 794 *et seq*.

[466] See articles 2, para. 1 (a), 3, 24, para. 2, 39-41, 58 and 60.

the original treaty may choose."[467] In the same way, the Vienna Convention does not envisage any particular formal requirements for agreements and practice under article 31, paragraph 3 (a) and (b).[468]

(6) While every treaty is an agreement, not every agreement is a treaty. Indeed, a "subsequent agreement" under article 31, paragraph 3 (a), "shall" only "be taken into account" in the interpretation of a treaty. Therefore, it is not necessarily binding. The question under which circumstances a subsequent agreement between the parties is binding, and under which circumstances it is merely a means of interpretation among several others, is addressed in draft conclusion 10 [9].

(7) The 1969 Vienna Convention distinguishes a "subsequent agreement" under article 31, paragraph 3 (a), from "any subsequent practice … which establishes the agreement of the parties regarding its interpretation" under article 31, paragraph 3 (b). This distinction is not always clear and the jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to assert it. In *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, the International Court of Justice used the expression "subsequent attitudes" to denote both what it later described as "subsequent agreements" and as subsequent unilateral "attitudes".[469] In the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the International Court of Justice left the question open whether the use of a particular map could constitute a subsequent agreement or subsequent practice.[470] WTO Panels and the Appellate Body have also not always distinguished between a subsequent agreement and subsequent practice under article 31, paragraph 3 (a) and (b).[471]

(8) The Tribunal of the North American Free Trade Agreement (NAFTA) in *CCFT v. United States*,[472] however, has squarely addressed this distinction. In that case the United

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[467] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 232 and 233; see also Villiger, *Commentary …* (footnote 414 above), at p. 513, para. 7; P. Sands, "Commentary on article 39 of the Vienna Convention", in Corten and Klein, *The Vienna Conventions …* (see footnote 394 above), at pp. 971-972, paras. 31-34.

[468] Draft article 27, paragraph 3 (*b*), which later became article 31, paragraph 3 (*b*), of the Vienna Convention, contained the word "understanding", which was changed to "agreement" at the United Nations Conference on the Law of Treaties. This change was "related to drafting only", see *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna 26 March-24 May 1968* (A/CONF.39/11, sales No. E.68.V.7), p. 169; Fox, "Article 31 (3) (a) and (b) …" (see footnote 440 above), at p. 63.

[469] See *Territorial Dispute* (see footnote 395 above), p. 6, at pp. 34 *et seq*., paras. 66 *et seq*.

[470] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 395 above), at p. 656, para. 61; in the *Gabčíkovo-Nagymaros* case, the Court spoke of "subsequent positions" in order to establish that "the explicit terms of the treaty itself were, therefore, in practice acknowledged by the parties to be negotiable", *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 77, para. 138, see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment (Jurisdiction and Admissibility), I.C.J. Reports 1995*, p. 6, at p. 16, para. 28 ("subsequent conduct").

[471] See "Scheduling guidelines" in WTO Panel Report, *Mexico — Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, and in WTO Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005; to qualify a "1981 Understanding" in WTO Panel Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000; "Tokyo Round SCM Code" in WTO Panel Report, *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, and a "waiver" in WTO Appellate Body Report, *EC — Bananas III* (see footnote 445 above).

[472] *C.C.F.T. v. United States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award on Jurisdiction, 28 January 2008; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on the Challenge to the President of the Committee, 3 October

States of America asserted that a number of unilateral actions by the three NAFTA parties could, if considered together, constitute a subsequent agreement.[473] In a first step, the Panel did not find that the evidence was sufficient to establish such a subsequent agreement under article 31, paragraph 3 (a).[474] In a second step, however, the Tribunal concluded that the very same evidence constituted a relevant subsequent practice that established an agreement between the parties regarding the interpretation:

> "The question remains: is there 'subsequent practice' that establishes the agreement of the NAFTA Parties on this issue within the meaning of article 31 (3) (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' the available evidence cited by the Respondent demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications ... .'"[475]

(9) This reasoning suggests that one difference between a "subsequent agreement" and "subsequent practice" under article 31, paragraph 3, lies in different forms that embody the "authentic" expression of the will of the parties. Indeed, by distinguishing between "any subsequent agreement" under article 31, paragraph 3 (a), and "subsequent practice ... which establishes the understanding of the parties" under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.[476] The difference between the two concepts, rather, lies in the fact that a "subsequent agreement between the parties" *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together, show "the common understanding of the parties as to the meaning of the terms".[477]

(10) Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act, or whether it is necessary to identify an agreement through individual acts that in their combination demonstrate a common position. A "subsequent agreement" under article 31, paragraph 3 (a), must therefore be "reached" and presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions.

(11) "Subsequent practice" under article 31, paragraph 3 (b), on the other hand, encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty that contribute to the identification of an agreement, or "understanding",[478] of the parties regarding the interpretation of the treaty. It is, however, possible that "practice" and

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2001, ICSID Case No. ARB/97/3, *ICSID Reports 2004*, vol. 6 (2004), p. 168, at p. 174, para. 12; P. Merkouris and M. Fitzmaurice, "Canons of treaty interpretation: selected case studies from the World Trade Organization and the North American Free Trade Agreement", in Fitzmaurice, Elias and Merkouris, *Treaty Interpretation* ... (see footnote 440 above), at pp. 217-233.

[473] *C.C.F.T. v. United States* (see footnote 472 above), paras. 174-177.

[474] *Ibid.*, paras. 184-187.

[475] *Ibid.*, paras. 188, see also para. 189; and in a similar sense: *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia BIT), Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, *ICSID Review — Foreign Investment Law Journal*, vol. 20, No. 2 (2005), p. 450, at pp. 528 *et seq.*, paras. 251 *et seq.*

[476] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, para. (15).

[477] *Ibid.*; see also Karl, *Vertrag und spätere Praxis* ... (footnote 454 above), at p. 294.

[478] The word "understanding" had been used by the Commission in the corresponding draft article 27, para. 3 (*b*), on the law of treaties (see footnote 468 above).

"agreement" coincide in specific cases and cannot be distinguished. This explains why the term "subsequent practice" is sometimes used in a more general sense, which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (a) and (b).[479]

(12) A group of separate subsequent agreements, each between a limited number of parties, but which, taken together, establish an agreement between all the parties to a treaty regarding its interpretation, is not normally "a" subsequent agreement under article 31, paragraph 3 (a). The term "subsequent agreement" under article 31, paragraph 3 (a), should, for the sake of clarity, be limited to a single agreement between all the parties. Different later agreements between a limited number of parties that, taken together, establish an agreement between all the parties regarding the interpretation of a treaty constitute subsequent practice under article 31, paragraph 3 (b). Different such agreements between a limited number of parties that, even taken together, do not establish an agreement between all the parties regarding the interpretation of a treaty may have interpretative value as a supplementary means of interpretation under article 32 (see below at paragraphs (23) and (24)). Thus, the use of the term "subsequent agreement" is limited to agreements among all the parties to a treaty that are manifested in one single agreement — or in a common act in whatever form that reflects the agreement of all parties.[480]

(13) A subsequent agreement under article 31, paragraph 3 (a), must be an agreement "regarding" the interpretation of the treaty or the application of its provisions. The parties must therefore purport, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.[481]

(14) Whether an agreement is one "regarding" the interpretation or application of a treaty can sometimes be determined by some reference that links the "subsequent agreement" to the treaty concerned. Such reference may also be comprised in a later treaty. In the *Jan Mayen* case between Denmark and Norway, for example, the International Court of Justice appears to have accepted that a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty. In that case, however, the Court ultimately declined to use the subsequent treaty for that purpose because it did not in any way "refer" to the previous treaty.[482] In *Dispute Regarding Navigation and Related Rights* between Costa Rica and Nicaragua, Judge *ad hoc* Guillaume referred to the actual practice of tourism on the San Juan River in conformity with a memorandum of understanding between the two States.[483] It was not clear, however, whether this particular memorandum was meant by the parties to serve as an interpretation of the boundary treaty under examination.

(15) The Court of Final Appeal in Hong Kong, China has provided an example of a rather strict approach when it was called upon to interpret the Sino-British Joint Declaration in the case of *Ng Ka Ling and Others v. Director of Immigration*.[484] In this case, one party

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[479] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 113, at pp. 127-128, para. 53: in this case, even an explicit subsequent verbal agreement was characterized by one of the parties as "subsequent practice".

[480] See WTO Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June, para. 371. A common act may consist of an exchange of letters … .

[481] *Ibid.*, paras. 366-378, in particular para. 372; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), at pp. 164 *et seq.*

[482] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 28.

[483] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 298-299, para. 16.

[484] See *Ng Ka Ling and Others v. Director of Immigration* (footnote 449 above).

alleged that the Sino-British Joint Liaison Group, consisting of representatives of China and the United Kingdom under article 5 of the Joint Declaration, had come to an agreement regarding the interpretation of the Joint Declaration. As evidence, the party pointed to a booklet that stated that it was compiled "on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the [Joint Liaison Group]". The Court, however, did not find that the purpose of the booklet was to "interpret or to apply" the Joint Declaration within the meaning of article 31, paragraph 3 (a).[485]

Paragraph 2 — definition of subsequent practice under article 31, paragraph 3 (b)

(16) Paragraph 2 of draft conclusion 4 does not intend to provide a general definition for any form of subsequent practice that may be relevant for the purpose of the interpretation of treaties. Paragraph 2 is limited to subsequent practice as a means of authentic interpretation that establishes the agreement of all the parties to the treaty, as formulated in article 31, paragraph 3 (b). Such subsequent practice (in a narrow sense) is distinguishable from other "subsequent practice" (in a broad sense) by one or more parties that does not establish the agreement of the parties, but which may nevertheless be relevant as a subsidiary means of interpretation according to article 32 of the 1969 Vienna Convention.[486]

(17) Subsequent practice under article 31, paragraph 3 (b), may consist of any "conduct". The word "conduct" is used in the sense of article 2 of the Commission's articles on the responsibility of States for internationally wrongful acts.[487] It may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement.[488] The question under which circumstances omissions, or silence, can contribute to an agreement of all the parties regarding the interpretation of a treaty is addressed in draft conclusion 10 [9], paragraph 2.

(18) Subsequent practice under article 31, paragraph 3 (b), must be conduct "in the application of the treaty". This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.

(19) It may be recalled that, in one case, a NAFTA Panel denied that internal legislation can be used as an interpretative aid:

> "Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to article 27

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[485] *Ibid.*, at paras. 152-153.

[486] On the distinction between the two forms of subsequent practice see below, paras. (23) and (24) of the present commentary.

[487] *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, pp. 34-35, paras. (2)-(4) of the commentary.

[488] Waldock, third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 61-62, paras. (32)-(33); *Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 23; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V2), pp. 53-264, at pp. 185-187, paras. 168-169.

> of the Vienna Convention, which states that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework."[489]

Whereas article 27 of the 1969 Vienna Convention is certainly valid and important, this rule does not signify that national legislation may not be taken into account as an element of subsequent State practice in the application of the treaty. There is a difference between invoking internal law as a justification for a failure to perform a treaty and referring to internal law for the purpose of interpreting a provision of a treaty law. Accordingly, international adjudicatory bodies, in particular the WTO Appellate Body and the European Court of Human Rights, have recognized and regularly distinguish between internal legislation (and other implementing measures at the internal level) that violates treaty obligations and national legislation and other measures that can serve as a means to interpret the treaty.[490] It should be noted, however, that an element of *bona fide* is implied in any "subsequent practice in the application of the treaty". A manifest misapplication of a treaty, as opposed to a *bona fide* application (even if erroneous), is therefore not an "application of the treaty" in the sense of articles 31 and 32.

(20) The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be "regarding its interpretation" has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see paragraphs (13) and (14) above). It may often be difficult to distinguish between subsequent practice that specifically and purposefully relates to a treaty, that is "regarding its interpretation", and other practice "in the application of the treaty". The distinction, however, is important because only conduct that the parties undertake "regarding the interpretation of the treaty" is able to contribute to an "authentic" interpretation, whereas this requirement does not exist for other subsequent practice under article 32.

(21) The question under which circumstances an "agreement of the parties regarding the interpretation of a treaty" is actually "established" is addressed in draft conclusion 10 [9].

(22) Article 31, paragraph 3 (b), does not explicitly require that the practice must be the conduct of the parties to the treaty themselves. It is, however, the parties themselves, acting through their organs,[491] or by way of conduct that is attributable to them, who engage in practice in the application of the treaty that may establish their agreement. The question of

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[489] NAFTA Arbitral Panel Final Report, *Cross-Border Trucking Services (Mexico v. United States of America)*, No. USA-MEX-98-2008-01, adopted 6 February 2001, para. 224 (footnotes omitted).

[490] For example, WTO Panel Report, *United States — Section 110(5) Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, para. 7.173; WTO Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, paras. 335-336; *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, *ICSID Reports 2003*, vol. 7, p. 492, para. 47; *V. v. the United Kingdom* [GC], no. 24888/94, 16 December 1999, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC], no. 8917/05, 3 December 2009, ECHR 2009-VI, para. 54; *Sigurður A. Sigurjónsson v. Iceland*, no. 16130/90, 30 June 1993, ECHR Series A no. 264, para. 35.

[491] Karl, *Vertrag und spätere Praxis* ... (see footnote 454 above), at pp. 115 *et seq.*

whether other actors can generate relevant subsequent practice is addressed in draft conclusion 5.[492]

Paragraph 3 — "other" subsequent practice

(23) Paragraph 3 of draft conclusion 4 addresses "other" subsequent practice, that is practice other than that referred to in article 31, paragraph 3 (b). This paragraph concerns "subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32", as mentioned in paragraph 4 of draft conclusion 2 [1]. This form of subsequent practice, which does not require the agreement of all the parties, was originally referred to in the commentary of the Commission as follows:

> "But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 [of what became article 31, paragraph 3, of the 1969 Vienna Convention] as an authentic means of interpretation alongside interpretative agreements. The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the 'further' means of interpretation mentioned in article 70."[493]

(24) Paragraph 3 of draft conclusion 4 does not enunciate a requirement, as it is contained in article 31, paragraph 3 (b), that the relevant practice be "regarding the interpretation" of the treaty. Thus, for the purposes of the third paragraph, any practice in the application of the treaty that may provide indications as to how the treaty should be interpreted may be a relevant supplementary means of interpretation under article 32.

(25) This "other" subsequent practice, since the adoption of the 1969 Vienna Convention, has been recognized and applied by international courts and other adjudicatory bodies as a means of interpretation (see paragraphs (26) to (34) below). It should be noted, however, that the WTO Appellate Body, in *Japan — Alcoholic Beverages II*,[494] has formulated a definition of subsequent practice for the purpose of treaty interpretation that seems to suggest that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation and not any other form of subsequent practice by one or more parties:

> "… subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation."[495]

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[492] See draft conclusion 5, para. 2.

[493] *Yearbook … 1964*, vol. II, document A/5809, p. 204, para. (13); see also *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, para. (15).

[494] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, and WTO Report of the Panel, WT/DS8/R, WT/DS10/R and WT/DS11/R, adopted on 1 November 1996.

[495] *Ibid.* (WTO Appellate Body Report), section E, p. 16.

However, the jurisprudence of the International Court of Justice and other international courts and tribunals, and ultimately even that of the WTO Dispute Settlement Body itself (see paragraphs (33) and (34) below), demonstrate that subsequent practice that fulfils all the conditions of article 31, paragraphs 3 (b), of the 1969 Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty that may be relevant for the purpose of treaty interpretation.

(26) In the case of *Kasikili/Sedudu Island*, for example, the International Court of Justice held that a report by a technical expert that had been commissioned by one of the parties and that had "remained at all times an internal document",[496] while not representing subsequent practice that establishes the agreement of the parties under article 31, paragraph 3 (b), could "nevertheless support the conclusions" that the Court had reached by other means of interpretation.[497]

(27) The ICSID Tribunals have also used subsequent State practice as a means of interpretation in a broad sense.[498] For example, when addressing the question of whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas v. Argentina* held that:

> "State practice further supports the meaning of this changing scenario. … Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements … among other examples, evidence increasing flexibility in the handling of international claims."[499]

(28) The European Court of Human Rights held in *Loizidou v. Turkey* that its interpretation was "confirmed by the subsequent practice of the Contracting Parties",[500] that is "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that [a]rticles 25 and 46 … of the Convention do not permit territorial or substantive restrictions".[501] More often the European Court of Human Rights has relied on — not necessarily uniform — subsequent State practice by referring to national legislation and domestic administrative practice, as a means of interpretation. In the case of *Demir and Baykara v. Turkey*, for example, the Court held that "[a]s to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognised"[502] and that "[t]he remaining exceptions can be justified only by particular circumstances".[503]

(29) The Inter-American Court of Human Rights, when taking subsequent practice of the parties into account, has also not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire, Constantine and Benjamin et al.*

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[496] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1,078, para. 55.

[497] *Ibid.*, p. 1,096, para. 80.

[498] O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals — An Empirical Analysis", *European Journal of International Law*, vol. 19, No. 2 (2008), p. 301, at p. 345.

[499] *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, *ICSID Reports 2003*, vol. 7, p. 492, at para. 47.

[500] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, para. 79.

[501] *Ibid.*, para. 80; it is noteworthy that the Court described "such a State practice" as being "uniform and consistent" despite the fact that it had recognised that two States possibly constituted exceptions (Cyprus and the United Kingdom; "whatever their meaning"), paras. 80 and 82.

[502] *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 52.

[503] *Ibid.*, para. 151; similarly *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, para. 69.

v. Trinidad and Tobago the Inter-American Court of Human Rights held that the mandatory imposition of the death penalty for every form of conduct that resulted in the death of another person was incompatible with article 4, paragraph 2, of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was "useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty".[504]

(30) The Human Rights Committee under the International Covenant on Civil and Political Rights is open to arguments based on subsequent practice in a broad sense when it comes to the justification of interferences with the rights set forth in the Covenant.[505] Interpreting the rather general terms contained in article 19, paragraph 3, of the Covenant (permissible restrictions on the freedom of expression), the Committee observed that "similar restrictions can be found in many jurisdictions",[506] and concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19, paragraph 3, of the Covenant.[507]

(31) ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In the *M/V "SAIGA"* (No. 2) case,[508] for example, the Tribunal reviewed State practice with regard to the use of force to stop a ship according to the United Nations Convention on the Law of the Sea.[509] Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice but rather assumed a certain general standard to exist.[510]

(32) The International Criminal Tribunal for the former Yugoslavia, referring to the Convention on the Prevention and Punishment of the Crime of Genocide,[511] noted in the *Jelisić* judgment that:

> "… the Trial Chamber … interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in [a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties. … The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgments rendered by the Tribunal for Rwanda. … The practice of

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[504] *Hilaire, Constantine and Benjamin et al.* (see footnote 400 above), Concurring Separate Opinion of Judge Sergio Garcia Ramirez, para. 12.

[505] *Jong-Cheol v. The Republic of Korea*, Views, 27 July 2005, Communication No. 968/2001, Report of the Human Rights Committee, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 40* (A/60/40), vol. II, annex V, G.

[506] *Ibid.*, para. 8.3.

[507] *Ibid.*; see also *Yoon and Choi v. The Republic of Korea*, Views, 3 November 2006, Communication Nos. 1321/2004 and 1322/2004, *ibid., Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, annex VII, V, para. 8.4.

[508] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports … 1999*, p. 10, at pp. 61-62, paras. 155-156.

[509] United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 293.

[510] *M/V "SAIGA" (No. 2)* (see footnote 508 above), at paras. 155-156; see also *"Tomimaru" (Japan v. Russian Federation)*, case No. 15, Prompt Release, Judgment, *ITLOS Reports … 2007*, p. 74, para. 72; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports … 1999*, p. 280, at paras. 45 and 50.

[511] United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

> States, notably through their national courts, and the work of international authorities in this field have also been taken into account."[512]

(33) The WTO dispute settlement bodies also occasionally distinguish between "subsequent practice" that satisfies the conditions of article 31, paragraph (b), and other forms of subsequent practice in the application of the treaty that they also recognize as being relevant for the purpose of treaty interpretation. In *US — Section 110(5) Copyright Act*[513] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[514] The Panel found evidence in support of the existence of such a doctrine in several member States' national legislation and noted:

> "… we recall that [a]rticle 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, [S]tate practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine."[515]

And the Panel added the following cautionary footnote:

> "By enunciating these examples of [S]tate practice we do not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of [a]rticle 31 (3) (b) of the Vienna Convention."[516]

(34) In *European Communities — Customs Classification of Certain Computer Equipment*, the WTO Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

> "A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions. … However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant … ."[517]

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[512] *Prosecutor v. Goran Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 61 (footnotes omitted); similarly *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 541.

[513] WTO Panel Report, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000.

[514] See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, para. 1.

[515] WTO Panel Report, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55 (footnotes omitted).

[516] *Ibid.*, at footnote 69.

[517] See WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, at para. 90. See also I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press, 2009), p. 342.

Thus, on closer inspection, the WTO dispute settlement bodies also recognize the distinction between "subsequent practice" under article 31, paragraph 3 (b), and a broader concept of subsequent practice that does not presuppose an agreement between all the parties of the treaty.[518]

(35) In using subsequent practice by one or more, but not all, parties to a treaty as a supplementary means of interpretation under article 32 one must, however, always remain conscious of the fact that "the view of one State does not make international law".[519] In any case, the distinction between agreed subsequent practice under article 31, paragraph 3 (b), as an authentic means of interpretation, and other subsequent practice (in a broad sense) under article 32, implies that a greater interpretative value should be attributed to the former. Domestic courts have sometimes not clearly distinguished between subsequent agreements and subsequent practice under article 31, paragraph 3, and other subsequent practice under article 32.[520]

(36) The distinction between subsequent practice under article 31, paragraph 3 (b), and subsequent practice under article 32 also contributes to answering the question of whether subsequent practice requires repeated action with some frequency[521] or whether a one-time application of the treaty may be enough.[522] In the WTO framework, the Appellate Body has found:

> "An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[523]

If, however, the concept of subsequent practice as a means of treaty interpretation is distinguished from a possible agreement between the parties, frequency is not a necessary element of the definition of the concept of "subsequent practice" in the broad sense (under article 32).[524]

(37) Thus, "subsequent practice" in the broad sense (under article 32) covers any application of the treaty by one or more parties. It can take various forms.[525] Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct

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[518] See also WTO Appellate Body Report, *US — COOL*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 452.

[519] *Sempra Energy International v. Argentine Republic*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 385; see also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, 22 May 2007, ICSID Case No. ARB/01/3, para. 337; WTO Panel Report, *US — Large Civil Aircraft (2nd Complaint)*, WT/DS353/R, adopted 23 March 2012, fn. 2420 in para. 7.953.

[520] See, for example: United Kingdom, House of Lords, *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, paras. 54-55 and 66-85 (Lord Mance); United Kingdom, House of Lords, *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, para. 38; United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, para. 47 (Lord Steyn); United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, para. 80 (Lord Hope); New Zealand, Court of Appeal, *Zaoui v. Attorney-General (No. 2)* [2005] 1 NZLR 690, para. 130 (Glazebrook J.); New Zealand, Court of Appeal, *P. v. Secretary for Justice, ex parte A.P.* [2004] 2 NZLR 28, para. 61 (Glazebrook J.); Germany, Federal Administrative Court, BVerfGE, vol. 104, p. 254, at pp. 256-257; judgment of 29 November 1988, 1 C 75/86 [1988], *Neue Zeitschrift für Verwaltungsrecht*, p. 765, at p. 766.

[521] Villiger, *Commentary* ... (see footnote 414 above), at p. 431, para. 22.

[522] Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), at p. 166.

[523] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, section E, p. 13.

[524] Kolb, *Interprétation et création du droit international* (Brussels, Bruylant, 2006), pp. 506-507.

[525] Aust, *Modern Treaty Law and Practice*, 3rd edition (Cambridge, United Kingdom, Cambridge University Press, 2013), at p. 239.

application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application. Such conduct may include official statements concerning the treaty's meaning, protests against non-performance or tacit acceptance of statements or acts by other parties.[526]

Conclusion 5
Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Commentary

(1) Draft conclusion 5 addresses the question of possible authors of subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. The phrase "under articles 31 and 32" makes it clear that this draft conclusion applies both to subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), and to subsequent practice as a supplementary means of interpretation under article 32. Paragraph 1 of draft conclusion 5 defines positively whose conduct in the application of the treaty may constitute subsequent practice under articles 31 and 32, whereas paragraph 2 states negatively which conduct does not, but which may nevertheless be relevant when assessing the subsequent practice of parties to a treaty.

Paragraph 1 — conduct constituting subsequent practice

(2) Paragraph 1 of draft conclusion 5, by using the phrase "any conduct which is attributable to a party to a treaty under international law", borrows language from article 2 (a) of the articles on responsibility of States for internationally wrongful acts.[527] Accordingly, the term "any conduct" encompasses actions and omissions and is not limited to the conduct of State organs of a State, but also covers conduct that is otherwise attributable, under international law, to a party to a treaty. The reference to the articles on responsibility of States for internationally wrongful acts does not, however, extend to the requirement that the conduct in question be "internationally wrongful" (see below paragraph (8)).

(3) An example of relevant conduct that does not directly arise from the conduct of the parties, but nevertheless constitutes an example of State practice, has been identified by the International Court of Justice in the *Kasikili/Sedudu Island* case. There the Court considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31, paragraph 3 (b), of the Vienna Convention if it:

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[526] Karl, *Vertrag und spätere Praxis* ... (see footnote 454 above), at pp. 114 *et seq.*

[527] Articles on the responsibility of States for internationally wrongful acts, with commentaries, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 35, para. (4) of the commentary; the question of the attribution of relevant subsequent conduct to international organizations for the purpose of treaty interpretation is addressed in draft conclusion 12 [11] below.

> "… was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[528]

(4) By referring to any conduct in the application of the treaty that is attributable to a party to the treaty, however, paragraph 1 does not imply that any such conduct necessarily constitutes, in a given case, subsequent practice for the purpose of treaty interpretation. The use of the phrase "may consist" is intended to reflect this point. This clarification is particularly important in relation to conduct of State organs that might contradict an officially expressed position of the State with respect to a particular matter and thus contribute to an equivocal conduct by the State.

(5) The Commission debated whether draft conclusion 5 should specifically address the question under which conditions the conduct of lower State organs would be relevant subsequent practice for purposes of treaty interpretation. In this regard, several members of the Commission pointed to the difficulty of distinguishing between lower and higher State organs, particularly given the significant differences in the internal organization of State governance. The point was also made that the relevant criterion was less the position of the organ in the hierarchy of the State than its actual role in interpreting and applying any particular treaty. Given the complexity and variety of scenarios that could be envisaged, the Commission concluded that this matter should not be addressed in the text of draft conclusion 5 itself, but rather in the commentary.

(6) Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the 1969 Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty. Accordingly, the International Court of Justice recognized in the *Case concerning rights of nationals of the United States in Morocco* that article 95 of the General Act of the International Conference of Algeciras (1906)[529] had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[530] The jurisprudence of arbitral tribunals confirms that relevant subsequent practice may emanate from lower officials. In the *German External Debts* decision, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[531] And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered

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[528] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1094, para. 74.

[529] 34 Stat. 2905 (1902-1907).

[530] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[531] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Decision, 16 May 1980, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 67-145, at pp. 103-104, para. 31.

some contrary official pronouncements by a higher authority, the French Government, to be decisive.[532]

(7) It thus appears that the practice of lower and local officials may be subsequent practice "in the application of a treaty" if this practice is sufficiently unequivocal and if the Government can be expected to be aware of this practice and has not contradicted it within a reasonable time.[533]

(8) The Commission did not consider it necessary to limit the scope of the relevant conduct by adding the phrase "for the purpose of treaty interpretation".[534] This had been proposed by the Special Rapporteur in order to exclude from the scope of the term "subsequent practice" such conduct that may be attributable to a State but that does not serve the purpose of expressing a relevant position of a State regarding the interpretation of a treaty.[535] The Commission, however, considered that the requirement, that any relevant conduct must be "in the application of the treaty", would sufficiently limit the scope of possibly relevant conduct. Since the concept of "application of the treaty" requires conduct in good faith, a manifest misapplication of a treaty falls outside this scope.[536]

Paragraph 2 — conduct non constituting subsequent practice

(9) Paragraph 2 of draft conclusion 5 comprises two sentences. The first sentence indicates that conduct other than that envisaged in paragraph 1, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. The phrase "other conduct" was introduced in order clearly to establish the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the Commission considered that conduct not covered by paragraph 1 may be relevant when "assessing" the subsequent practice of parties to a treaty.

(10) "Subsequent practice in the application of a treaty" will be brought about by those who are called to apply the treaty, which are normally the States parties themselves. The general rule has been formulated by the Iran-U.S. Claims Tribunal as follows:

> "It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty.
>
> "Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be

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[532] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision, 14 January 2003, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 231-266, at p. 257, para. 66 and p. 259, para. 74.

[533] See Chanaki, *L'adaptation des traités* ... (see footnote 440 above), at pp. 323-328; Gardiner, *Treaty Interpretation* (footnote 392 above), at p. 269-270; M. Kamto, "La volonté de l'État en droit international", *Recueil des cours ... 2004*, vol. 310, pp. 9-428, pp. 142-144; Dörr, "Article 31..." (see footnote 439 above), at pp. 555-556, para. 78.

[534] See A/CN.4/660, para. 144 (draft conclusion 4, para. 1).

[535] *Ibid.*, p. 46, para. 120.

[536] See para. (19) of the commentary to draft conclusion 4 above.

> attributed as such to the United States as the other party to the Algiers Declarations."[537]

(11) The first sentence of the second paragraph of draft conclusion 5 is intended to reflect this general rule. It emphasizes the primary role of the States parties to a treaty who are the masters of the treaty and are ultimately responsible for its application. This does not exclude that conduct by non-State actors may also constitute a form of application of the treaty if it can be attributed to a State party.[538]

(12) "Other conduct" in the sense of paragraph 2 of draft conclusion 5 may be that of different actors. Such conduct may, in particular, be practice of parties that is not "in the application of the treaty" or statements by a State that is not party to a treaty about the latter's interpretation,[539] or a pronouncement by a treaty monitoring body or a dispute settlement body in relation to the interpretation of the treaty concerned,[540] or acts of technical bodies that are tasked by Conferences of States Parties to advise on the implementation of treaty provisions, or different forms of conduct or statements of non-State actors.

(13) The phrase "assessing the subsequent practice" in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty.[541] Such reflection or initiation of subsequent practice of the parties by the conduct of other actors should not,

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[537] See Iran-United States Claims Tribunal, *United States of America et al. v. Islamic Republic of Iran et al.*, Award No. 108-A-16/582/591-FT, *Iran-United States Claims Tribunal Reports*, vol. 5 (1984), p. 57, at p. 71; similarly Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. United States of America*, *ibid.*, vol. 38 (2004-2009), p. 77, at pp. 124-125, paras. 127-128; see also Iran-United States Claims Tribunal, Interlocutory Award No. ITL 37-111-FT, *International Schools Services, Inc. (ISS) v. National Iranian Copper Industries Company (NICICO)*, *ibid.*, vol. 5 (1984), p. 338, Dissenting Opinion of President Lagergren, p. 348, at p. 353: "… the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case". For the Algiers Declarations (Declaration of the Government of the Democratic and Popular Republic of Algeria and Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, see *International Legal Materials*, vol. 20, No. 1 (1981), pp. 224 and 230 (respectively), at pp. 232-233).

[538] See, for example, Iran-United States Claims Tribunal (footnote 537 above), Dissenting Opinion of Judge Parviz Ansari, p. 97, at p. 99.

[539] See, for example, *Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008*, p. 1, para. 3 (available at: www.state.gov/documents/organization/138852.pdf). To the extent that the statement by the United States relates to the interpretation of the Optional Protocol to the International Covenant on Civil and Political Rights (United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171), to which the United States is not party nor a contracting State, its statement constitutes "other conduct" under draft conclusion 5, para. 2.

[540] See, for example, International Law Association, Committee on International Human Rights Law and Practice, "Final report on the impact of findings of United Nations Human Rights treaty bodies", *Report of the Seventy-first Conference, Berlin, 16-21 August 2004* (London, 2004), p. 621, paras. 21 *et seq.*

[541] See Gardiner, *Treaty Interpretation* (see footnote 392 above), at p. 270.

however, be conflated with the practice by the parties to the treaty themselves, including practice that is attributable to them. Activities of actors that are not State parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty.

(14) Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the 1986 Vienna Convention, which mentions the "established practice of the organization" as one form of the "rules of the organization".[542] Draft conclusion 5 only concerns the question of whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.

(15) Reports by international organizations at the universal level, which are prepared on the basis of a mandate to provide accounts on State practice in a particular field, may enjoy considerable authority in the assessment of such practice. For example, the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* of the Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR Handbook") is an important work that reflects and thus provides guidance for State practice.[543] The same is true for the so-called 1540 Matrix, which is a systematic compilation by the United Nations Security Council Committee established pursuant to resolution 1540 (2004) of 24 April 2004 on implementation measures taken by Member States.[544] As far as the Matrix relates to the implementation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction,[545] as well as to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,[546] it constitutes evidence for and an assessment of subsequent State practice to those treaties.[547]

(16) Other non-State actors may also play an important role in assessing subsequent practice of the parties in the application of a treaty. A pertinent example is the International Committee of the Red Cross (ICRC).[548] Apart from fulfilling a general mandate conferred

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[542] This aspect of subsequent practice to a treaty will be the addressed at a later stage of the work on the topic.

[543] See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011), HCR/1P/4/ENG/REV. 3 (www.refworld.org/docid/4f33c8d92.htm), Foreword; the view that the UNHCR Handbook itself expresses State practice has correctly been rejected by the Federal Court of Australia in *Semunigus v. Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (1999), Judgment, 14 April 1999, paras. 5-13; the UNHCR Handbook nevertheless possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based on article 35, paragraph 1, of the Convention Relating to the Status of Refugees, 1951 (United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137), according to which "[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for refugees … in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[544] Security Council resolution 1540 (2004) of 24 April 2004, operative para. 8 (c); according to the 1540 Committee's website, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of UN Security Council resolution 1540 by Member States" (www.un.org/en/sc/1540/national-implementation/matrix.shtml (accessed 11 May 2016)).

[545] United Nations, *Treaty Series*, vol. 1015, No. 14860, p. 163.

[546] United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.

[547] See, generally, Gardiner, *Treaty Interpretation* (footnote 392 above), at p. 270.

[548] H.-P. Gasser, "International Committee of the Red Cross (ICRC)", *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), para. 20.

on it by the Geneva Conventions for the protection of war victims and by the Statutes of the International Red Cross and Red Crescent Movement,[549] ICRC occasionally provides interpretative guidance on the 1949 Geneva Conventions[550] and the Additional Protocols[551] on the basis of a mandate from the Statutes of the Movement.[552] Article 5, paragraph 2 (g), of the Statutes provides:

> "The role of the International Committee, in accordance with its [s]tatutes, is in particular: ... (g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof."

On the basis of this mandate, ICRC, for example, published in 2009 an *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.[553] The Interpretative Guidance is the outcome of an "expert process" based on an analysis of State treaty and customary practice and it "reflect[s] the ICRC's institutional position as to how existing [international humanitarian law] should be interpreted".[554] In this context it is, however, important to note that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (2011), while recalling "the important roles of the [ICRC]", "emphasiz[es] the primary role of States in the development of international humanitarian law".[555]

(17) Another example of conduct of non-State actors that may be relevant for assessing the subsequent practice of States parties is the Monitor, a joint initiative of the International Campaign to Ban Landmines and the Cluster Munitions Coalition. The Monitor acts as a *de facto* monitoring regime[556] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)[557] and the 2008 Convention on Cluster Munitions (Dublin Convention).[558] The Monitor lists pertinent statements and practice by States parties and

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[549] *Ibid.*, para. 25.

[550] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 ("Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 ("Geneva Convention III"); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 ("Geneva Convention IV").

[551] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *ibid.*, No. 17513, p. 609.

[552] Adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006. Available from www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf (accessed on 17 May 2016).

[553] Geneva, 2009, p. 10. Available from www.icrc.org.

[554] *Ibid.*, p. 9.

[555] Resolution 1 on strengthening legal protection for victims of armed conflicts, 1 December 2011.

[556] See www.the-monitor.org.

[557] United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

[558] *Ibid.*, vol. 2688, No. 47713, p. 39.

signatories and identifies, *inter alia*, interpretative questions concerning the Dublin Convention.[559]

(18) The examples of ICRC and the Monitor show that non-State actors can provide valuable evidence of subsequent practice of parties, contribute to assessing this evidence and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may be different from those of States parties. Their assessments must thus be critically reviewed.

(19) The Commission considered whether it should also refer, in the text of draft conclusion 5, to "social practice" as an example of "other conduct … which may be relevant when assessing the subsequent practice of parties to a treaty".[560] Taking into account the concerns expressed by several members regarding the meaning and relevance of that notion, the Commission considered it preferable to address the question of the possible relevance of "social practice" in the commentary.

(20) The European Court of Human Rights has occasionally considered "increased social acceptance"[561] and "major social changes"[562] to be relevant for the purpose of treaty interpretation. The invocation of "social changes" or "social acceptance" by the Court, however, ultimately remains linked to State practice.[563] This is true, in particular, for the important cases of *Dudgeon v. the United Kingdom*[564] and *Christine Goodwin v. the United Kingdom*.[565] In *Dudgeon v. the United Kingdom*, the Court found that there was an "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied" and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[566] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[567] And in *Christine Goodwin v. the United Kingdom*, the Court attached importance "to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[568]

(21) The European Court of Human Rights thus verifies whether social developments are actually reflected in State practice. This was true, for example, in cases concerning the

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[559] See, for example, *Cluster Munitions Monitor 2011*, pp. 24-31.

[560] See A/CN.4/660, paras. 129 *et seq.*

[561] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, para. 85.

[562] *Ibid.*, para. 100.

[563] See also *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002, para. 65; *Burden and Burden v. the United Kingdom*, no. 13378/05, 12 December 2006, para. 57; *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000, para. 1; *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, para. 58.

[564] *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, in particular para. 60.

[565] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, in particular para. 85.

[566] See *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, para. 60.

[567] *Ibid.*

[568] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, para. 85; see also, *ibid.*, para. 90.

status of children born out of wedlock[569] and in cases that concerned the alleged right of certain Roma ("Gypsy") people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[570]

(22) It can be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent practice in the application of a treaty. Social practice has, however, occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Commentary

(1) The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified.

Paragraph 1, first sentence — the term "regarding the interpretation"

(2) The first sentence of paragraph 1 recalls that the identification of subsequent agreements and subsequent practice for the purposes of article 31, paragraph 3 (a) and (b), requires particular consideration of the question of whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations.

(3) Subsequent agreements under article 31, paragraph 3 (a), must be "regarding the interpretation of the treaty or the application of its provisions" and subsequent practice under article 31, paragraph 3 (b), must be "in the application of the treaty" and thereby establish an agreement "regarding its interpretation".[571] The relationship between the terms

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[569] *Mazurek v. France*, no. 34406/97, 1 February 2000, ECHR 2000-II, para. 52; see also *Marckx v. Belgium*, no. 6833/74, 13 June 1979, ECHR Series A no. 31, para. 41; *Inze v. Austria*, no. 8695/79, 28 October 1987, ECHR Series A no. 126, para. 44; *Brauer v. Germany*, no. 3545/04, 28 May 2009, para. 40.

[570] *Chapman v. the United Kingdom* [GC], no. 27238/95, 18 January 2001, ECHR 2001-I, paras. 70 and 93, see also *Lee v. the United Kingdom* [GC], no. 25289/94, 18 January 2001, paras. 95-96; *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001, paras. 104-105; *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001, paras. 107-108; *Jane Smith v. the United Kingdom* [GC], no. 25154/94, 18 January 2001, paras. 100-101.

[571] See above draft conclusion 4, paras. 1-3, and commentary thereto, paras. (17)-(20).

"interpretation" and "application" in article 31, paragraph 3, is not clear-cut. "Interpretation" is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified. "Application" encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. "Interpretation" refers to a mental process, whereas "application" focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 (see paragraphs (4) to (6) below) but they are also closely interrelated and build upon each other.

(4) Whereas there may be aspects of "interpretation" that remain unrelated to the "application" of a treaty,[572] application of a treaty almost inevitably involves some element of interpretation — even in cases in which the rule in question appears to be clear on face value.[573] Therefore, an agreement or conduct "regarding the interpretation" of the treaty and an agreement or conduct "in the application" of the treaty both imply that the parties assume, or are attributed, a position regarding the interpretation of the treaty.[574] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31, paragraph 3 (a) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties, this may be less clearly identifiable in the case of a "subsequent agreement … regarding … the application of its provisions" under article 31, paragraph 3 (a) (second alternative).[575] Assuming a position regarding interpretation "by application" is also implied in simple acts of application of the treaty under articles 31, paragraph 3 (b), that is, in "every measure taken on the basis of the interpreted treaty".[576] The word "or" in article 31, paragraph 3 (a), thus does not describe a mutually exclusive relationship between "interpretation" and "application".

(5) The significance of an "application" of a treaty, for the purpose of its interpretation, is, however, not limited to the identification of the position that the State party concerned thereby assumes regarding its interpretation. Indeed, the way in which a treaty is applied

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[572] According to G. Haraszti, "… interpretation has the elucidation of the meaning of the text as its objective while application implies the specifying of the consequences devolving on the contracting parties" (see Haraszti, *Some Fundamental Problems* ... (footnote 446 above), p. 18); he recognizes, however, that "[a] legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (*ibid.*, p. 15).

[573] Harvard Draft Convention on the Law of Treaties, *American Journal of International Law Supp.*, vol. 29, 1935, p. 653, at pp. 938-939; Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 372; Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 116; Report of the Study Group on fragmentation of international law; 2006 (A/CN.4/L.682 and Corr.1), para. 423; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 28-30 and 238; Yasseen, "L'interprétation des traités…" (see footnote 393 above) p. 47; U. Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", *Netherlands International Law Review*, vol. 54, No. 1 (2007), pp. 141-144 and p. 147; G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40 (1994), p. 44; Villiger, "The rules on interpretation …" (see footnote 439 above), p. 111.

[574] Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 266; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), p. 162; Karl, *Vertrag und spätere Praxis* ... (see footnote 454 above), pp. 114 and 118; Dörr, "Article 31 …" (see footnote 439 above), p. 556, paras. 80 and 82.

[575] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed or clarified, see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna 26 March-24 May 1968 and 9 April-22 May, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publications, Sales No. E.68.V.7), 31st meeting, 19 April 1968, p. 168, para. 53.

[576] See Linderfalk, *On the Interpretation of Treaties* (footnote 446 above), pp. 164-165 and 167; see also draft conclusions 2 [1], para. 4, and 4, para. 3.

not only contributes to determining the meaning of the treaty, but also to the identification of the degree to which the interpretation that the States parties have assumed is "grounded" and thus more or less firmly established.

(6) It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that such application is the only legally possible one under the treaty and under the circumstances.[577] Further, the concept of "application" does not exclude certain conduct by non-State actors that the treaty recognizes as forms of its application that are attributable to its parties[578] and hence can constitute practice establishing the agreement of the parties. Finally, the legal significance of a particular conduct in the application of a treaty is not necessarily limited to its possible contribution to interpretation under article 31, but may also contribute to meeting the burden of proof[579] or to fulfilling the conditions of other rules.[580]

(7) Subsequent conduct that is not motivated by a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation, within the meaning of article 31, paragraph 3. In the *Certain Expenses of the United Nations* case, for example, some judges doubted whether the continued payment by the Member States of the United Nations of their membership contributions signified acceptance of a certain practice of the Organization.[581] Judge Fitzmaurice formulated a well-known warning in this context, according to which "the argument drawn from practice, if taken too far, can be question-begging".[582] According to Fitzmaurice, it would be "hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so".[583]

(8) Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[584]

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[577] See below draft conclusion 7, para. 1.

[578] See Boisson de Chazournes, "Subsequent practice, practices, …" (footnote 415 above), p. 53, at pp. 54, 56 and 59-60.

[579] In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 117, para. 105, the International Court of Justice denied that certain conduct (statements) satisfied the burden of proof with respect to the Russian Federation's compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination between 1999 and July 2008, in particular because the conduct was not found to specifically relate to the Convention. According to Judge Simma, the burden of proof had been met to some degree, see Separate Opinion of Judge Simma, *ibid.*, pp. 199-223, paras. 23-57.

[580] In the case concerning the *Kasikili/Sedudu Island* (see footnote 395 above), the International Court of Justice analysed subsequent practice not only in the context of treaty interpretation but also in the context of acquisitive prescription (see p. 1092, para. 71, p. 1096, para. 79, and p. 1105, para. 97).

[581] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at pp. 201-202 (Separate Opinion of Judge Fitzmaurice) and pp. 189-195 (Separate Opinion of Judge Spender).

[582] *Ibid.*, p. 201.

[583] *Ibid.*

[584] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 16, para. 28.

(9) Another example of a voluntary practice that is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the context of refugee law. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States that grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention or "regarding its interpretation".[585]

(10) It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or in the application of a treaty under article 31, paragraph 3 (a) and (b), from other conduct or developments in the wider context of the treaty, including from "contemporaneous developments" in the subject area of the treaty. Such a distinction is, however, important since only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation. The general rule would seem to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (a) and (b).[586]

(11) The characterization of a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) and (b), as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This point can be illustrated by examples from judicial and State practice.

(12) The jurisprudence of the International Court of Justice provides a number of examples. On the one hand, the Court did not consider the "joint ministerial communiqués" of two States to "be included in the conventional basis of the right of free navigation" since the "modalities for co-operation which they put in place are likely to be revised in order to suit the Parties".[587] The Court has also held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice that indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[588] In any case, the exact significance of a collective expression of views of the parties can only be identified by a careful consideration as to whether and to what extent such expression is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that "relevant resolutions and Guidelines [of the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and

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[585] See A. Skordas, "General provisions: article 5", in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, A. Zimmermann, ed. (Oxford, Oxford University Press, 2011), p. 682, para. 30; J. McAdam, *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007), p. 21.

[586] On the "weight" of an agreement or practice as a means of interpretation, see draft conclusion 9 [8], paras. 1-3, below; for an example of the need, and also the occasional difficulty, to distinguish between specific conduct by the parties regarding the interpretation of a treaty and more general development, see *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at pp. 41-58, paras. 103-151.

[587] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 234, para. 40; see also *Kasikili/Sedudu Island* (footnote 395 above), at p. 1091, para. 68, where the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[588] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55-56; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 262-264.

scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available".[589]

(13) When the Iran-United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to Iran, the Tribunal found, referring to the subsequent practice of the parties, that this treaty contained an implicit obligation of compensation in case of non-return:[590]

> "66. … Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.
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> …
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> "68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defense articles would not be approved, the United States expressly stated that 'Iran will be reimbursed for the cost of equipment in so far as possible'."

This position was criticized by Judge Holtzmann in his dissenting opinion:

> "Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty."[591]

Together, the majority opinion and the dissent clearly identify the need to analyse carefully whether the parties, by an agreement, or a practice assume a position "regarding the interpretation" of a treaty.

(14) The fact that States parties assume a position regarding the interpretation of a treaty sometimes also may be inferred from the character of the treaty or of a specific provision.[592] Whereas subsequent practice in the application of a treaty often consists of conduct by different organs of the State (executive, legislative, judicial or other) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, does not, for the most part, explicitly address the question of whether a particular practice was undertaken "regarding the interpretation" of the Convention.[593] Thus, when describing the domestic legal situation in the member States, the

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[589] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[590] See Iran-United States Claims Tribunal, *Islamic Republic of Iran and United States of America*, *Iran-United States Claims Tribunal Reports*, Partial Award No. 382-B1-FT vol. 19 (1989), pp. 294-295.

[591] Separate Opinion of Judge Holtzmann, Concurring in Part, Dissenting in Part, *ibid.*, at p. 304.

[592] See second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671), para. 15.

[593] See, for example, *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, para. 60; *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para.

Court rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court rather presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention and that they act in a way that reflects their understanding of their obligations.[594] The Inter-American Court of Human Rights has also on occasion used legislative practice as a means of interpretation.[595] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.[596]

(15) Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War[597] provides that: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from abusively invoking the will of prisoners of war in order to delay repatriation.[598] ICRC has, however, always insisted as a condition for its participation that the will of a prisoner of war not to be repatriated be respected.[599] This approach, as far as it has been reflected in the practice of States parties, does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

> "According to the Fourth Geneva Convention, no protected person may be transferred to a country 'where he or she may have reason to fear persecution for his or her political opinions or religious beliefs' [article 45, paragraph 4, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War]. While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC's conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-

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48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 146; *Cruz Varas and others v. Sweden*, no. 15576/89, 20 March 1991, ECHR Series A no. 201, para. 100.

[594] See footnote 593 above; see further *Marckx v. Belgium*, no. 6833/74, 13 June 1979, ECHR Series A no. 31, para. 41; *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, para. 69; *Mazurek v. France*, no. 34406/97, 1 February 2000, ECHR 2000-II, para. 52.

[595] See, for example, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (see footnote 400 above), para. 12.

[596] *Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62.

[597] See footnote 550 above.

[598] C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Zurich, Schulthess, 1977), pp. 145-156 and pp. 171-175; see in general on the duty to repatriate, S. Krähenmann, "Protection of prisoners in armed conflict", in *The Handbook of International Humanitarian Law*, 3rd edition, D. Fleck, ed. (Oxford, Oxford University Press, 2013), pp. 409-410.

[599] Thus, by its involvement, the ICRC tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (see Krähenmann, "Protection of prisoners in armed conflict" (footnote 598 above), pp. 409-410).

> international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released)."[600]

(16) This formulation suggests that the State practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice.[601] The 2004 United Kingdom Manual provides that:

> "A more contentious issue is whether prisoners of war *must* be repatriated even against their will. Recent practice of [S]tates indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will."[602]

(17) This particular combination of the words "must" and "should" indicates that the United Kingdom, like other States, is not viewing the subsequent practice as demonstrating an interpretation of the treaty according to which the declared will of the prisoner of war must always be respected.[603]

(18) The preceding examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations.[604]

Paragraph 1, second sentence — temporary non-application of a treaty or modus vivendi

(19) The second sentence of paragraph 1 is merely illustrative. It refers to two types of cases that need to be distinguished from practice regarding the interpretation of a treaty.

(20) A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement

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[600] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), p. 455 (footnotes omitted).

[601] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 2: Practice* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), pp. 2893-2894, paras. 844-855, and online update for Australia, Israel, the Netherlands and Spain, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_section d.

[602] United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), pp. 205-206, para. 8.170 (footnote omitted).

[603] The United States manual mentions only the will of prisoners of war who are sick or wounded, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 2: Practice* (footnote 601 above), pp. 2893-2894, paras. 844-855; but United States practice after the Second Gulf War was to have ICRC establish the prisoner's will and to act accordingly (United States of America, Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (United States Government Printing Office, 1992), pp. 707-708, available from www.globalsecurity.org/military/library/report/1992/cpgw.pdf).

[604] A/CN.4/671, paras. 11-18. See also L. Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 25-26.

temporarily not to apply the treaty,[605] or an agreement on a practical arrangement (*modus vivendi*).[606] The following example is illustrative.

(21) Article 7 of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field provides that: "A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [The] flag … shall bear a red cross on a white ground."[607] During the Russo-Turkish War of 1877-1878, the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention "'had so far prevented Turkey from exercising its rights under the Convention because it gave offence to the Muslim soldiers'".[608] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties, which resulted in the acceptance of the red crescent only for the duration of the conflict.[609] At The Hague Peace Conferences of 1899 and 1907 and during the 1906 Conference for the Revision of the Geneva Convention of 1864, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention.[610] The Ottoman Empire and Persia, however, at least gained the acceptance of "reservations" that they formulated to that effect in 1906.[611] This acceptance of the reservations of the Ottoman Empire and Persia in 1906 did not mean, however, that the parties had accepted that the 1864 Geneva Convention had been interpreted in a particular way prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was seen rather, at least until 1906, as not being covered by the 1864 Geneva Convention, but it was accepted as a temporary and exceptional measure that left the general treaty obligation unchanged.

Paragraph 2 – variety of forms

(22) The purpose of paragraph 2 of draft conclusion 6 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (a) and (b). The Commission has recognized that subsequent practice under article 31, paragraph 3 (b), consists of any "conduct" in the application of a treaty, including under certain circumstances, inaction, which may contribute to establishing an

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[605] See A/CN.4/671, p. 33, para. 71.

[606] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at pp. 234-235, para. 40; *Pulp Mills on the River Uruguay* (see footnote 395 above), p. 14, at pp. 65-66, paras. 138-140; J. Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 32; for another example, see A/CN.4/671, para. 72; and J.R. Crook, "Contemporary practice of the United States", *American Journal of International Law*, vol. 105 (2011), p. 775 *et seq.*, at pp. 809-812.

[607] See ICRC, *International Red Cross Handbook*, 12th edition (Geneva, 1983), p. 20.

[608] "Bulletin international des Sociétés de Secours aux Militaires blessés", No. 29 (January 1877), pp. 35-37, quoted in F. Bugnion, *The Emblem of the Red Cross. A Brief History* (Geneva, ICRC, 1977), p. 15.

[609] *Ibid.*, No. 31 (July 1877), p. 89, quoted in Bugnion, *The Emblem of the Red Cross* … (see footnote 608 above), p. 18.

[610] Bugnion, *The Emblem of the Red Cross* … (see footnote 608 above), pp. 19-31.

[611] Joined by Egypt upon accession in 1923, see Bugnion, *The Emblem of the Red Cross* … (footnote 608 above), pp. 23-26; it was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections, that the Red Crescent and the Red Lion and Sun were finally recognized as a distinctive sign by article 19, paragraph 2, of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (League of Nations, *Treaty Series*, vol. 118, No. 2733, p. 303).

agreement regarding the interpretation of the treaty.[612] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, and may even include conduct by non-State actors that is attributable to one or more States parties and that falls within the scope of what the treaty conceives as forms of its application.[613] Thus, the individual conduct that may contribute to a subsequent practice under article 31, paragraph 3 (b), need not meet any particular formal criteria.[614]

(23) Subsequent practice at the international level need not necessarily be joint conduct.[615] A parallel conduct by parties may suffice. It is a separate question whether parallel activity actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see draft conclusion 10 [9], paragraph 1, below).[616] Subsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memorandums of understanding.[617] Subsequent agreements can also be found in certain decisions of a conference of States parties (see draft conclusion 11 [10], paragraphs 1, 2 and 3, below).

Paragraph 3 -- identification of subsequent practice under article 32

(24) Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.[618] The Commission decided to treat such "other subsequent practice" (see draft conclusion 4, paragraph 3)[619] under article 32 in a separate paragraph for the sake of analytical clarity (see draft conclusion 7, paragraph 2, and draft conclusion 9 [8], paragraph 3, below), but it does not thereby call into question the unity of the process of interpretation. The considerations that are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), also apply, *mutatis mutandis*, to the identification of "other subsequent practice" under article 32. Thus, agreements between less than all parties to a treaty regarding the interpretation of a treaty or its application are a form of subsequent practice under article 32.

(25) An example of a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International

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[612] See above commentary to draft conclusion 4, paras. (17)-(20).

[613] See, for example, commentary to draft conclusion 5 above; Boisson de Chazournes, "Subsequent practice ..." (footnote 415 above), pp. 54, 56 and 59-60; Gardiner, *Treaty Interpretation* (footnote 392 above), pp. 257-259; see also *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at pp. 42-45, paras. 103-111 and pp. 48-49, paras. 119-122, and p. 50, para. 126; Dörr, "Article 31 ..." (see footnote 439 above), pp. 555-556, para. 78.

[614] Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 254-255.

[615] *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at p. 33; *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1213, para. 17 (Dissenting Opinion of Judge Parra-Aranguren).

[616] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 737, para. 258: but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 83-84, para. 117, where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru v. Chile)* (footnote 613 above).

[617] Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 244 and 250.

[618] See above, paras. (1)-(4) of the present commentary; and A/CN.4/671, paras. 3-5.

[619] See above commentary to draft conclusion 2 [1], para. (10).

Freight Cross-Border Trucking Services of 6 July 2011.[620] The memorandum of understanding does not refer to Canada, the third party of the North American Free Trade Agreement (NAFTA), and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under NAFTA". These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (a) or (b), but that it rather remains limited to being a practical arrangement between a limited number of parties that is subject to challenge by other parties or by a judicial or quasi-judicial institution.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.

Commentary

Paragraph 1, first sentence — clarification of the meaning of a treaty

(1) Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice on the interpretation of a treaty. The purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation (see draft conclusion 2 [1], paragraph 5).[621] They are therefore not necessarily in themselves conclusive.

(2) Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interactive process of interpretation of a treaty, which consists of placing appropriate emphasis in any particular case on the various means of interpretation in a "single combined operation".[622] The taking into account of subsequent

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[620] Crook, "Contemporary practice of the United States" (see footnote 606 above), pp. 809-812; see also: Mexico, *Diario Oficial de la Federación* (7 July 2011), "Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte", publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América (www.dof.gob.mx).

[621] See above commentary to draft conclusion 2 [1], para. 5, paras. (12)-(15).

[622] *Ibid.*

agreements and subsequent practice under articles 31, paragraph 3, and 32 may thus contribute to a clarification of the meaning of a treaty[623] in the sense of a narrowing down (specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paragraphs (4), (6), (7), (10) and (11) below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to the parties, including the scope for the exercise of discretion by the parties under the treaty (see paragraphs (12) to (15) below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[624] Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation).[625] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31, paragraph 4, subsequent agreements and subsequent practice may shed light on this special meaning. The following examples[626] illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the "ordinary meaning" of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case, for example,[627] in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons":

> "… have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons."[628]

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.[629] For example, in the *Case*

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[623] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: "'Interpretative declaration' means a unilateral statement … whereby [a] State or [an] international organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions." (*Official records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. IV, guideline 1.2); see also commentary to guideline 1.2, para. (18) (A/66/10/Add.1).

[624] See above commentary to draft conclusion 2 [1], para. 5, para. (14); *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[625] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (footnote 395 above), at p. 656, paras. 59-61 and p. 665, para. 80; *Territorial Dispute* (footnote 395 above), at p. 34, paras. 66-71; *Dispute regarding Navigational and Related Rights* (footnote 395 above), at p. 290 (Declaration of Judge *ad hoc* Guillaume).

[626] For more examples see Nolte, "Jurisprudence under special regimes" (footnote 398 above), pp. 210-306.

[627] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67; *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[628] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

[629] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

concerning rights of nationals of the United States of America in Morocco, the Court stated:

> "The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs … have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner.
>
> "In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case."[630]

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty.[631]

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms "in their context" (article 31, paragraph 1). Subsequent agreements and subsequent practice, in interaction with this particular means of interpretation, may also contribute to identifying a narrower or broader interpretation of a term of a treaty.[632] In the *Inter-Governmental Maritime Consultative Organization Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight … largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMO)[633] since this concept of "largest ship-owning nations" permitted different interpretations (such as determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to practice under other provisions in the Convention and held:

> "This reliance upon registered tonnage in giving effect to different provisions of the Convention … persuade[s] the Court to view that it is unlikely that when [article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations."[634]

(8) Together with the text and the context, article 31, paragraph 1, accords importance to the "object and purpose" for its interpretation.[635] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty[636] or

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[630] *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[631] See, *mutatis mutandis*, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, where the International Court of Justice interpreted the term "expenses" broadly and "action" narrowly in the light of the respective subsequent practice of the United Nations, at pp. 158-161 ("expenses") and pp. 164-165 ("action").

[632] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

[633] United Nations, *Treaty Series*, vol. 289, No. 4214, p. 3.

[634] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167-169; *obiter dicta*: *Proceedings pursuant to the OSPAR Convention (Ireland-United Kingdom)*, 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 59-151, at p. 99, para. 141.

[635] Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 211 and 219.

[636] *Ibid.*, pp. 212-215; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory*

reconcile invocations of the "object and purpose" of a treaty with other means of interpretation.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[637] and *Oil Platforms* cases,[638] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

> "From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[639]

Paragraph 1, second sentence — narrowing or widening or otherwise determining the range of possible interpretation

(10) State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice only contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty, but may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion that a treaty grants to States.[640]

(11) For example, whereas the ordinary meaning of the terms of article 5 of the 1944 Convention on International Civil Aviation[641] do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring

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Opinion, I.C.J. Reports 1971, p. 16, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; R. Higgins, "Some observations on the inter-temporal rule in international law", in *Theory of International Law at the Threshold of the 21st Century*, J. Makarczyk, ed. (The Hague, Kluwer Law International, 1996), pp. 173-181, at p. 180; Distefano, "La pratique subséquente …" (see footnote 573 above), pp. 52-54; Crema, "Subsequent agreements and subsequent practice …" (footnote 604 above), p. 21.

[637] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 50, para. 27.

[638] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 813 and 815, paras. 27 and 30.

[639] See also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67.

[640] This is not to suggest that there may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *Treaty Interpretation* (footnote 392 above), pp. 32-33 and p. 268, quoting the House of Lords in *R v. Secretary of State for the Home Department, ex parte Adan* [2001] AC 477: "… It is necessary to determine the autonomous meaning of the relevant treaty provision. … It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the 1969 Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting [S]tate. In principle therefore there can only be one true interpretation of a treaty. … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning" (The Law Reports, *Appeal Cases 2001*, vol. 2, at pp. 515-517 (Lord Steyn)).

[641] United Nations, *Treaty Series*, vol. 15, No. 102, p. 2.

permission.[642] Another case is article 22, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations,[643] which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic properties will usually be met with the protests of States,[644] the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.[645] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[646] In that sense, the meaning of the term "execution" — and, thus, the scope of protection accorded to means of transportation — is specified by the subsequent practice of parties.

(12) Another possible example concerns article 12 of Protocol II[647] to the 1949 Geneva Conventions, which provides:

> "Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly."

Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under all circumstances, subsequent practice suggests that States may possess some discretion with regard to its application.[648] As armed groups have in recent years specifically attacked medical convoys that were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

> "As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these

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[642] S.D. Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 85; A. Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 215.

[643] United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[644] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford Commentaries on International Law, 3rd edition (Oxford, Oxford University Press, 2008), pp. 160-161; J. Salmon, *Manuel de droit diplomatique* (Brussels, Bruylant, 1994), p. 208, para. 315.

[645] See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Documents/A21.pdf); Iceland, Protocol Department, Ministry of Foreign Affairs, *Diplomatic Handbook* (Reykjavik, 2009), p. 14 (www.mfa.is/media/PDF/Diplomatic_Handbook.PDF); United Kingdom, see the statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords, HL Deb, 12 December 1983, vol. 446 cc3-4; United States, see M. Nash (Leich), "Contemporary practice of the United States relating to international law", *American Journal of International Law*, vol. 88, No. 2 (April 1994), p. 312, at pp. 312-313.

[646] Denza, *Diplomatic Law* ... (see footnote 644 above), p. 160; M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd edition (Baden-Baden, Germany, Nomos, 2010), p. 70.

[647] See footnote 551 above.

[648] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, ICRC and Martinus Nijhoff, 1987), p. 1440, paras. 4742-4744; H. Spieker, "Medical transportation", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 7-12; see also the less stringent future tense in the French version "sera arboré".

medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have thus, along with Belgium, France, the United Kingdom, Canada and the United States, decided within ISAF to cover up the protective emblem on medical vehicles."[649]

(13) Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem[650] under exceptional circumstances allows a margin of discretion for the parties.

(14) A treaty provision that grants States an apparently unconditional right may raise the question of whether this discretion is limited by the purpose of the rule. For example, according to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is *persona non grata*. States mostly issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities or having committed other serious violations of the law of the receiving State or caused significant political irritation.[651] However, States have also made such declarations in other circumstances, such as when envoys caused serious injury to a third party[652] or committed repeated infringement of the law[653] or even to enforce their drink-driving laws.[654] It is even conceivable that declarations are made without clear reasons or for purely political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as *personae non gratae*. Thus, such practice confirms that article 9 provides an unconditional right.[655]

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[649] Deutscher Bundestag, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, Bundestagsdrucksache 17/1338, p. 2 (translation by the Special Rapporteur).

[650] Spieker, "Medical transportation" (see footnote 648 above), para. 12.

[651] See Denza, *Diplomatic Law* ... (footnote 644 above), pp. 77-88 with further references to declarations in relation to espionage; see also Salmon, *Manuel de droit diplomatique* (footnote 644 above), p. 484, para. 630; and Richtsteig, *Wiener Übereinkommen über diplomatische* ... (footnote 646 above), p. 30.

[652] The Netherlands, Protocol Department, Ministry of Foreign Affairs, *Protocol Guide for Diplomatic Missions and Consular Posts*. Available from www.government.nl/government/documents/leaflets/2015/04/15/protocol-guide-for-diplomatic-missions-en-consular-posts.

[653] France, Ministère des affaires étrangères et du développement, *Guide for Foreign Diplomats Serving in France: Immunities — Respect for Local Laws and Regulations* (www.diplomatie.gouv.fr/en/ministry/guide-for-foreign-diplomats/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, traffic regulations to be followed by foreign missions in Turkey, Principal Circular Note 63552, Traffic Regulations 2005/PDGY/63552 (6 April 2005) (www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston, "United Kingdom materials on international law 1985", *British Yearbook of International Law*, vol. 56, No. 1 (1985), p. 437.

[654] See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna_convention_idp-convention_vienne_vfa.aspx?lang=eng); United States, Department of State, Diplomatic Note 10-181 of the Department of State (24 September 2010) (www.state.gov/documents/organization/149985.pdf), pp. 8-9.

[655] See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 105, at p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

Paragraph 2 — other subsequent practice under article 32

(15) Paragraph 2 of draft conclusion 7 concerns possible effects of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3), which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation that the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. Article 32 thereby makes a distinction between a use of preparatory work or of "other subsequent practice" to confirm a meaning arrived at under article 31 and its use to "determine" the meaning. Hence, recourse may be had to "other subsequent practice" under article 32 not only to determine the meaning of the treaty in certain circumstances, but also — and always — to confirm the meaning resulting from the application of article 31.[656]

(16) Subsequent practice under article 32 can contribute, for example, to reducing possible conflicts when the "object and purpose" of a treaty appears to be in tension with specific purposes of certain of its rules.[657] In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice emphasized that the "parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence".[658] The parties thereby reconciled a possible tension by taking into account a certain subsequent practice by only one of the parties as a supplementary means of interpretation (under article 32).[659]

(17) Another example of "other subsequent practice" under article 32 concerns the term "feasible precautions" in article 57, paragraph 2 (ii), of Protocol I[660] to the 1949 Geneva Conventions. This term has been used in effect by article 3, paragraph 4, of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980,[661] which provides that: "Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This language has come to

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[656] WTO Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China — Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 19 January 2010, para. 403; "Although the Panel's application of [a]rticle 31 of the Vienna Convention to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to *confirm* that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under [a]rticle 32 of the *Vienna Convention* would *necessarily* have been different if the Panel had found that the application of [a]rticle 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to [a]rticle 32 to *determine*, rather than to *confirm*, the meaning of that term. We do not share this view. The elements to be examined under [a]rticle 32 are distinct from those to be analysed under [a]rticle 31, but it is the same elements that are examined under [a]rticle 32 irrespective of the outcome of the [a]rticle 31 analysis. Instead, what may differ, depending on the results of the application of [a]rticle 31, is the weight that will be attributed to the elements analysed under [a]rticle 32." See also Villiger, *Commentary* ... (footnote 414 above), p. 447, para. 11.

[657] See WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — AB-1998-4*, WT/DS58/AB/R, adopted 6 November 1998, para. 17 ("… most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 216.

[658] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1074, para. 45.

[659] *Ibid.*, at p. 1078, para. 55 and p. 1096, para. 80.

[660] *Ibid.*, at p. 1077, para. 55, and p. 1096, para. 80.

[661] United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137.

be accepted by way of subsequent practice in many military manuals as a general definition of "feasible precautions" for the purpose of article 57, paragraph (2) (ii), of Protocol I to the 1949 Geneva Conventions.[662]

(18) The identification of subsequent practice under articles 31, paragraph 3 (b), and 32 has sometimes led domestic courts to arrive at broad and narrow interpretations. For example, the United Kingdom House of Lords interpreted the term "damage" under article 26, paragraph 2, of the Warsaw Convention as more generally including "loss", invoking the subsequent conduct of the parties.[663] On the other hand, the United States Supreme Court, having regard to the subsequent practice of the parties, decided that the term "accident" in article 17 of the 1929 Warsaw Convention should be interpreted narrowly in the sense that it excluded events that were not caused by an unexpected or unusual event.[664] Another example of a restrictive interpretation is a decision in which the Federal Court of Australia interpreted the term "impairment of dignity" under article 22 of the Vienna Convention on Diplomatic Relations as only requiring the receiving State to protect against breaches of the peace or the disruption of essential functions of embassies, and not against any forms of nuisance or insult.[665]

(19) Domestic courts, in particular, sometimes refer to decisions from other domestic jurisdictions and thus engage in a "judicial dialogue" even if no agreement of the parties can thereby be established.[666] Apart from thereby applying article 32, such references may add to the development of a subsequent practice together with other domestic courts.[667] However, the line between an appropriate use and a selective invocation of decisions of other domestic courts may be thin.[668] Lord Hope of the United Kingdom House of Lords,

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[662] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, volume 2* ... (footnote 601 above), pp. 359-360, paras. 160-164 and the online update for the military manual of Australia (2006) (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols* ... (footnote 648 above), p. 683, para. 2202.

[663] United Kingdom, House of Lords, *Fothergill v. Monarch Airlines Ltd.* [1981] AC 251, at p. 278 (Lord Wilberforce) and p. 279 (Lord Diplock); similarly, Germany, Federal Court (Civil Matters), BGHZ, vol. 84, p. 339, at pp. 343-344.

[664] United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 403-404.

[665] Australia, Federal Court of Australia, *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Geraldo Magno and Ines Almeida* [1992] FCA 566, paras. 30-35 (Einfeld J.); see also United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47-48 (Lord Steyn).

[666] See, for example, United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 397-407; United States, Supreme Court, *Abbott v. Abbott* 560 U.S. (2010), Opinion of the Court (delivered by Justice Kennedy), Slip Opinion (www.supremecourt.gov/opinions/09pdf/08-645.pdf) (accessed 9 June 2016), at pp. 12-16; Germany, Federal Administrative Court, BVerwGE, vol. 139, p. 272, at pp. 288-289; High Court of Australia, *Andrew John Macoun v. Commissioner of Taxation* [2015] HCA 44, at pp. 75-82.

[667] A. Tzanakopulos, "Judicial dialogue as a means of interpretation", in *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, H.P. Aust and G. Nolte, eds. (Oxford, Oxford University Press, 2016), p. 72, at p. 94; E. Benvenisti, "Reclaiming democracy: the strategic uses of foreign and international law by national courts", *American Journal of International Law*, vol. 102 (2008), at pp. 241-274.

[668] United Kingdom, Supreme Court, *R (Adams) v. Secretary of State for Justice* [2011] UKSC 18, para. 17 (Lord Philips) ("[t]his practice on the part of only one of the many signatories to the ICCPR does not provide a guide to the meaning of article 14 (6) .... It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14 (6)").

quoting the Vienna rules of interpretation, has provided a general orientation when he stated:

> "In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand, a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them."[669]

(20) Much depends on how this general approach is applied. For example, selective invocation of the decisions of one particular national jurisdiction or the practice of a particular group of States should be avoided.[670] On the other hand, it may be appropriate, in a case in which the practice in different domestic jurisdictions diverges, to emphasize the practice of a representative group of jurisdictions[671] and to give more weight to the decisions of higher courts.[672]

Paragraph 3 — interpretation versus modification or amendment

(21) Paragraph 3 of draft conclusion 7 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). The paragraph reminds the interpreter that agreements subsequently arrived at may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the 1969 Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). The second sentence, while acknowledging that there are examples to the contrary in case law and diverging opinions in the literature, stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

(22) According to article 39 of the 1969 Vienna Convention: "A treaty may be amended by agreement between the parties." Article 31, paragraph 3 (a), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and

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[669] United Kingdom, House of Lords, *King* v. *Bristow Helicopters Ltd (Scotland)* [2002] UKHL 7, at para. 81.

[670] *Ibid.*, at para. 7 (Lord Mackay): "Because I consider it important that the Warsaw Convention should have a common construction in all jurisdictions that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd* (1991) 499 US 530 and *El Al Israel Airlines v. Tseng*, particularly as the United States is such a large participant in carriage by air"; or Einfeld J. for the Federal Court of Australia in *Commissioner of the Australian Federal Police and the Commonwealth of Australia* v. *Geraldo Magno and Ines Almeida* [1992] FCA 566, in a case concerning the interpretation of the term "impairment of dignity" of a diplomatic representation under article 22 of the Vienna Convention on Diplomatic Relations, recalling article 31, paragraph 3 (b), who stated that "international application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations ouiside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom", at para. 30.

[671] Canada, Supreme Court, *Yugraneft Corp. v. Rexx Management Corp.* [2010] 1 SCR 649, para. 21 (Rothstein J.).

[672] United Kingdom, House of Lords: *Sidhu v. British Airways* [1997] AC 430, at p. 453 (Lord Hope); *Fothergill v. Monarch Airlines Ltd.* [1981] AC 251, pp. 275-276 (Lord Wilberforce).

the application of its provisions", and does not seem to address the question of amendment or modification. As the WTO Appellate Body has held:

> "… the term 'application' in Article 31 (3) (a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be 'applied'; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation …".[673]

(23) Articles 31, paragraph 3 (a), and 39, if read together, demonstrate that agreements that the parties reach subsequently to the conclusion of a treaty can interpret and amend or modify the treaty.[674] An agreement under article 39 need not display the same form as the treaty that it amends.[675] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay* case:

> "Whatever its specific designation and in whatever instrument it may have been recorded (the [Administrative Commission of the River Uruguay] minutes), this 'understanding' is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement."[676]

(24) It is often difficult to draw a distinction between agreements of the parties under a specific treaty provision that attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39 to 41.[677] International case law and State practice suggest[678] that informal agreements that are alleged to derogate from treaty obligations should be narrowly interpreted. There do not seem to be any formal criteria other than those set forth in article 39, if applicable, apart from the ones that may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a rather wide

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[673] WTO, Appellate Body Report, *EC — Bananas III* (see footnote 445 above), paras. 391-393.

[674] Murphy, "The relevance of subsequent agreement …" (see footnote 642 above), p. 88.

[675] Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 107 with reference to Waldock, *Official Records of the United Nations Conference on the Law of Treaties* ... (A/CONF.39/11) (see footnote 575 above), 37th meeting, 24 April 1968, p. 207, paras. 49-52; Villiger, *Commentary* ... (see footnote 414 above), p. 513, paras. 7, 9 and 11; K. Odendahl, "Article 39. General rule regarding the amendment of treaties", in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties* ... (see footnote 439 above), p. 706, at para. 16.

[676] *Pulp Mills on the River Uruguay* (see footnote 395 above), at pp. 62-63, paras. 128 and 131; the Court then concluded, in the case under review, that these conditions had not been fulfilled, at pp. 62-66, paras. 128-142.

[677] In judicial practice, it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute* (footnote 395 above), at p. 29, para. 60 ("… in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration"); it is sometimes considered that an agreement under art. 31, para. 3 (a), can also have the effect of modifying a treaty (see Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 212-214 with examples.

[678] *Pulp Mills on the River Uruguay* (see footnote 395 above), at p. 63, paras. 131 and 140; Crawford, "A consensualist interpretation of article 31 (3) …" (see footnote 606 above), p. 32; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at pp. 125-126, para. 132; *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, *ICSID Reports*, vol. 6 (2004), pp. 84-85, para. 177 (www.state.gov/documents/organization/16586.pdf); *Ibid.*, Part IV, chap. C, paras. 20-21; A/CN.4/671, paras. 146-165.

scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement actually has the effect of amending or modifying a treaty.[679] An agreement to modify a treaty is thus not excluded, but also not to be presumed.[680]

(25) Turning to the question of whether the parties can amend or modify a treaty by a common subsequent practice, the Commission originally proposed, in its draft articles on the law of treaties, to include the following provision in the 1969 Vienna Convention, which would have explicitly recognized the possibility of a modification of treaties by subsequent practice:

> "Article 38. Modification of treaties by subsequent practice
>
> A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."[681]

(26) This draft article gave rise to an intense debate at the Vienna Conference.[682] An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, the question was discussed whether the rejection of draft article 38 meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Many writers came to the conclusion that the negotiating States simply did not wish to address this question in the 1969 Vienna Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice that establishes the agreement of the parties to that effect.[683] International courts and tribunals, on the other hand, have since the adoption of the 1969 Vienna Convention mostly refrained from recognizing this possibility.

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[679] It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty, see Murphy, "The relevance of subsequent agreement …" (footnote 642 above), p. 83.

[680] *Ibid.*, p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) …" (see footnote 606 above), p. 32.

[681] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 236 (footnote omitted).

[682] See *Official Records of the United Nations Conference on the Law of Treaties* ... (A/CONF.39/11) (footnote 575 above), 37th meeting, 24 April 1968, pp. 207-215; A/CN.4/671, paras. 119-121; Distefano, "La pratique subséquente …" (footnote 573 above), pp. 56-61.

[683] Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 138; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 275-280; Yasseen, "L'interprétation des traités…" (see footnote 393 above), pp. 51-52; Kamto, "La volonté de l'État …" (see footnote 533 above), pp. 134-141, at p. 134; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213; Villiger, *Commentary* ... (see footnote 414 above), p. 432, para. 23; Dörr, "Article 31 …" (see footnote 439 above), p. 555, para. 76 (in accord, Odendahl, "Article 39 …" (see footnote 675 above), p. 702, paras. 10-11); Distefano, "La pratique subséquente …" (see footnote 573 above), pp. 62-67; H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989: supplement, 2006 — part three", *British Yearbook of International Law 2006*, vol. 77, pp. 1-82, p. 65; M.N. Shaw, *International Law*, 6th edition (Cambridge, United Kingdom, Cambridge University Press, 2008), p. 934; I. Buga, "Subsequent practice and treaty modification", in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, M.J. Bowman and D. Kritsiotis, eds. (forthcoming), at footnote 452 with further references; disagreeing with this view, in particular, and stressing the solemnity of the conclusion of a treaty in contrast with the informality of practice Murphy, "The relevance of subsequent agreement …" (see footnote 642 above), pp. 89-90; see also Hafner, "Subsequent agreements and practice …" (see footnote 655 above), pp. 115-117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

(27) In the case concerning the *Dispute regarding Navigational and Related Rights*, the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[684] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (b), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties as the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognizes in draft conclusion 8 [3] that subsequent agreements and subsequent practice, like other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[685] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the Court raises the question of how far subsequent practice under article 31, paragraph 3 (b), can contribute to "interpretation" and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes "difficult, if not impossible, to fix".[686]

(28) Apart from the dictum in *Dispute regarding Navigational and Related Rights*,[687] the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the *Namibia Advisory Opinion* as well as for the *Wall Advisory Opinion*, in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty.[688] Since these opinions concerned treaties establishing an international organization it seems difficult to derive a general rule of the law of treaties from them. The questions of subsequent agreements and subsequent practice

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[684] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 242, para. 64; see also *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (footnote 532 above); Yasseen, "L'interprétation des traités ..." (see footnote 393 above), p. 51; Kamto, "La volonté de l'État ... " (see footnote 533 above), pp. 134-141; R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge* (Cologne, Berlin, Heymanns, 1963), p. 132.

[685] See draft conclusion 8 [3] and commentary thereto, paras. (1)-(18).

[686] Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 138; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 275; Murphy, "The relevance of subsequent agreement ..." (see footnote 642 above), p. 90; B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 46; Karl, *Vertrag und spätere Praxis* ... (see footnote 454 above), pp. 42-43; Sorel and Boré Eveno, "1969 Vienna Convention, Article 31 ..." (see footnote 440 above), p. 825, para. 42; Dörr, "Article 31 ..." (see footnote 439 above), p. 555, para. 76; this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the Dissenting Opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island* (footnote 395 above), at pp. 1212-1213, para. 16; similarly, Hafner, "Subsequent agreements and practice ..." (see footnote 655 above), p. 114; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), p. 168.

[687] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 242, para. 64.

[688] Thirlway, "The law and procedure of the International Court of Justice 1960-1989 ..." (see footnote 683 above), p. 64.

relating to constituent instruments of international organizations are addressed in draft conclusion 12 [11].[689]

(29) Other important cases in which the International Court of Justice has raised the issue of possible modification by the subsequent practice of the parties concern boundary treaties. As the Court said in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

> "Hence the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law … ."[690]

(30) The Court found such acquiescence in the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France), which, according to the Court, required a reaction on the part of the other side (Thailand).[691] This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by States in their debate at the Vienna Conference.[692] The judgment also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States — although it is often assumed that this was not the case.[693]

(31) Thus, while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. Rather the Court has reached interpretations that were difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.[694]

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[689] See already *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10*, A/67/10, p. 124, para. 238, and, *ibid., Sixty-third Session, Supplement No. 10*, A/63/10, annex A, para. 42.

[690] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[691] *Case concerning the Temple of Preah Vihear* (see footnote 488 above): "an acknowledgement by conduct was undoubtedly made in a very definite way … it is clear that the circumstances were such as called for some reaction" (p. 23); "[a] clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction" (p. 30).

[692] M. Kohen, "*Uti possidetis*, prescription et pratique subséquente à un traité dans l'affaire de l'Ile de Kasikili/Sedudu devant la Cour internationale de Justice", *German Yearbook of International Law*, vol. 43 (2000), p. 253, at p. 272.

[693] *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple of Preah Vihear* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty" (see *Kasikili/Sedudu Island* (footnote 395 above), Dissenting Opinion of Judge Parra-Aranguren, at pp. 1212-1213, para. 16); Buga, "Subsequent practice and treaty modification" (see footnote 683 above), at footnote 500.

[694] In particular the Namibia opinion (see footnote 636 above) has been read as implying that subsequent practice has modified Article 27, paragraph 3, of the Charter of the United Nations, see Alain Pellet, "Article 38", in *The Statute of the International Court of Justice A Commentary*, 2nd edition, A. Zimmermann and others, eds. (Oxford, Oxford University Press, 2012), p. 844, para. 279, note 809; *cf.* A/CN.4/671, paras. 124-126.

Contrary holdings by arbitral tribunals have been characterized either as an "isolated exception"[695] or rendered before the Vienna Conference and critically referred to there.[696]

(32) The WTO Appellate Body has made clear that it would not accept an interpretation that would result in a modification of a treaty obligation, as this would not be an "application" of an existing treaty provision.[697] The Appellate Body's position may be influenced by article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes, according to which: "Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."[698]

(33) The European Court of Human Rights has occasionally recognized the subsequent practice of the parties as a possible source for a modification of the Convention. In an *obiter dictum* in the 1989 case of *Soering v. the United Kingdom*, the Court held:

> " … that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (*ibid.*, pp. 40-41, § 103)."[699]

(34) Applying this reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi v. the United Kingdom*:

> "All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to

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[695] M. Kohen, "Keeping subsequent agreements and practice in their right limits", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 34 *et seq.*, at p. 43 regarding *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 83-195, at pp. 110-111, paras. 3.6-3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 1-118, see pp. 56-57, paras. 209-210, in which the Arbitral Tribunal held, in an *obiter dictum*, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected" (*ibid.*, p. 57); but see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et de droit européen*, vol. 14 (2004), pp. 9-32, at p. 20.

[696] *Interpretation of the Air Transport Services Agreement between the United States of America and France*, 22 December 1963, UNRIAA, vol. XVI (Sales No. E/F.69.V.1), pp. 5-74, at pp. 62-63; *Official Records of the United Nations Conference on the Law of Treaties* ... (A/CONF.39/11) (see footnote 575 above), 37th meeting, 24 April 1968, p. 208, para. 58 (Japan); Murphy, "The relevance of subsequent agreement ..." (footnote 642 above), p. 89.

[697] WTO, Appellate Body Report, *EC — Bananas III* (see footnote 445 above), Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU and Corr.1 adopted 11 December 2008, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, paras. 391-393.

[698] Marrakesh Agreement establishing the World Trade Organization (see footnote 445 above), Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, at p. 401.

[699] See *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, para. 119, referring to *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, ECHR 2005-IV, and quoting *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161.

> its interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty (compare *Soering*, cited above, §§ 102-04)."[700]

(35) The case law of international courts and tribunals allows the following conclusions: the WTO situation suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately, much depends on the treaty or on the treaty provisions concerned.[701]

(36) The situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion can be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[702] considered that finding such a modification should be avoided, if at all possible. Instead the Court prefers to accept broad interpretations that may stretch the ordinary meaning of the terms of the treaty.

(37) This conclusion from the jurisprudence of the International Court of Justice is in line with certain considerations that were articulated during the debates among States on draft article 38 of the 1969 Vienna Convention.[703] Today, the consideration that amendment procedures that are provided for in a treaty are not to be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[704] The concern that was expressed by a number of States at the Vienna Conference, according to which the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, has also since gained in relevance.[705] And, while the principle *pacta sunt servanda* is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement of all the parties, it is equally true that

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[700] *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, para. 120; B. Malkani, "The obligation to refrain from assisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (2013), pp. 523-556.

[701] See Buga, "Subsequent practice and treaty modification" (footnote 683 above), at footnotes 126-132.

[702] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[703] A/CN.4/671, paras. 119-121.

[704] Murphy, "The relevance of subsequent agreement and subsequent practice ..." (footnote 642 above), p. 89; Simma, "Miscellaneous thoughts on subsequent agreements ..." (footnote 686 above), p. 47; Hafner, "Subsequent agreements and practice ..." (see footnote 655 above), pp. 115-117; J.E. Alvarez, "Limits of change by way of subsequent agreements and practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 130.

[705] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99 (English translation available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html), paras. 19-21; German Federal Fiscal Court, BFHE, vol. 157, p. 39, at pp. 43-44; *ibid.*, vol. 227, p. 419, at p. 426; *ibid.*, vol. 181, p. 158, at p. 161; S. Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 145-148; Alvarez, "Limits of change ..." (see footnote 704 above), p. 130; I. Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 154-159; and H. Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 165-166.

the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.[706]

(38) In conclusion, while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts to interpret a treaty broadly are possible since article 31 of the 1969 Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[707] In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.[708]

Conclusion 8 [3]
Interpretation of treaty terms as capable of evolving over time

> Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Commentary

(1) Draft conclusion 8 [3] addresses the role that subsequent agreements and subsequent practice may play in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time.

(2) In the case of treaties, the question of the so-called intertemporal law[709] has traditionally been put in terms of whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion ("contemporaneous" or "static" interpretation), or in the light of the circumstances and the law at the time of its application

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[706] See, for example, Kohen, "*Uti possidetis*, prescription et pratique subséquente ..." (footnote 692 above), p. 274 (in particular with respect to boundary treaties).

[707] See above draft conclusion 2 [1], para. 5, and the commentary thereto; Hafner, "Subsequent agreements and practice ..." (see footnote 655 above), p. 117; some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other means of interpretation, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 275; Dörr, "Article 31 ..." (see footnote 439 above), pp. 554-555, para. 76.

[708] See draft conclusion 8 [3]; in the case concerning the *Dispute regarding Navigational and Related Rights*, for example, the International Court of Justice could leave the question open as to whether the term "comercio" had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation. *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at pp. 242-243, paras. 64-66.

[709] T.O. Elias, "The doctrine of intertemporal law", *American Journal of International Law*, vol. 74 (1980), pp. 285 *et seq.*; D.W. Greig, *Intertemporality and the Law of Treaties* (London, British Institute of International and Comparative Law, 2001); M. Fitzmaurice, "Dynamic (evolutive) interpretation of treaties, Part I", *The Hague Yearbook of International Law*, vol. 21 (2008), pp. 101-153; M. Kotzur, "Intertemporal law", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com); U. Linderfalk, "Doing the right thing for the right reason: why dynamic or static approaches should be taken in the interpretation of treaties", *International Community Law Review*, vol. 10, No. 2 (2008), pp. 109 *et seq.*; A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edition (Berlin, Duncker & Humblot, 1984), pp. 496 *et seq.*, paras. 782 *et seq.*

("evolutive", "evolutionary", or "dynamic" interpretation).[710] Arbitrator Max Huber's dictum in the *Island of Palmas* case according to which "a judicial fact must be appreciated in the light of the law contemporary with it"[711] led many international courts and tribunals, as well as many writers, to generally favour contemporaneous interpretation.[712] At the same time, the Arbitral Tribunal in the *Iron Rhine* case asserted that there was, "general support among the leading writers today for evolutive interpretation of treaties".[713]

(3) The Commission, in its commentary on the draft articles on the law of treaties, considered in 1966 that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[714] Similarly, the debates within the Commission's Study Group on fragmentation led to the conclusion in 2006 that it is difficult to formulate and to agree on a general rule that would give preference either to a "principle of contemporaneous interpretation" or to one that generally recognizes the need to take account of an "evolving meaning" of treaties.[715]

(4) Draft conclusion 8 [3] should not be read as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. Draft conclusion 8 [3] rather emphasizes that subsequent agreements and subsequent practice, as any other means of treaty interpretation, can support both a contemporaneous and an evolutive interpretation (or, as it is often called, evolutionary interpretation), where appropriate. The Commission, therefore, concluded that these means of treaty interpretation "may assist in determining whether or not" an evolutive interpretation is appropriate with regard to a particular treaty term.

(5) This approach is confirmed by the jurisprudence of international courts and tribunals. The various international courts and tribunals that have engaged in evolutive interpretation — albeit in varying degrees — appear to have followed a case-by-case approach in determining, through recourse to the various means of treaty interpretation that are referred to in articles 31 and 32, whether or not a treaty term should be given a meaning capable of evolving over time.

(6) The International Court of Justice, in particular, is seen as having developed two strands of jurisprudence, one tending towards a more "contemporaneous" and the other towards a more "evolutionary" interpretation, as Judge *ad hoc* Guillaume has pointed out in

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[710] M. Fitzmaurice, "Dynamic (evolutive) interpretation ..." (see footnote 709 above).

[711] *Island of Palmas case (the Netherlands/United States of America)*, award of 4 April 1928, UNRIAA, vol. II (Sales No. 1949.V.1), pp. 829-871, at p. 845.

[712] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 220-221, para. (11).

[713] *Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway* (see footnote 397 above), p. 35, at para. 81; see, for example, A. Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 215-216; M. Fitzmaurice, "Dynamic (evolutive) interpretation ..." (see footnote 709 above), at pp. 29-31; G. Distefano, "L'interprétation évolutive de la norme internationale", *Revue générale de droit international public*, vol. 115, No. 2 (2011), pp. 373-396, at pp. 384 and 389 *et seq.*; Higgins, "Some observations on the inter-temporal rule ..." (see footnote 636 above), at pp. 174 *et seq.*; Sorel and Boré Eveno, "1969 Vienna Convention, Article 31 ..." (see footnote 440 above), at p. 807, para. 8; P.-M. Dupuy, "Evolutionary interpretation of treaties", in Cannizzaro, *The Law of Treaties ...* (see footnote 439 above), at pp. 125 *et seq.*; M. Kotzur, "Intertemporal Law" (see footnote 709 above), at para. 14.

[714] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (16); Higgins, "Some observations on the inter-temporal rule ..." (see footnote 636 above), at p. 178.

[715] Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 478.

his Declaration in *Dispute regarding Navigational and Related Rights*.[716] The decisions that favour a more contemporaneous approach mostly concern specific treaty terms ("water-parting";[717] "main channel or Thalweg";[718] names of places;[719] and "mouth" of a river[720]). On the other hand, the cases that support an evolutive interpretation seem to relate to more general terms. This is true, in particular, for terms that are by definition evolutionary, such as "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations. The International Court of Justice, in its *Namibia Opinion*, has given those terms an evolving meaning by referring to the evolution of the right of peoples to self-determination after the Second World War.[721] The "generic" nature of a particular term in a treaty[722] and the fact that the treaty is designed to be "of continuing duration"[723] may also give rise to an evolving meaning.

(7) Other international judicial bodies sometimes also employ an evolutive approach to interpretation, though displaying different degrees of openness towards such interpretation. The WTO Appellate Body has only occasionally resorted to evolutive interpretation. In a well-known case it has, however, held that "the generic term 'natural resources' in article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'".[724] The ITLOS Seabed Disputes Chamber has held that the meaning of certain obligations to ensure[725] "may change over time",[726] and has emphasized that the rules of State liability in the United Nations Convention on the Law of the Sea are apt to follow developments in the law and are "not considered to be static".[727] The European Court of Human Rights has held more generally "that the Convention is a living instrument which … must be interpreted in the light of present-day conditions".[728] The Inter-American Court of Human Rights also more generally follows an evolutive approach to interpretation, in particular in connection

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[716] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 294 *et seq.*, paras. 9 *et seq.*; see also *Yearbook … 2005*, vol. II (Part Two), p. 89, para. 479; Report of the Study Group on fragmentation of international law (A/CN.4/L.682 and Corr.1), para. 478; Institut de droit international, resolution on "Le problème intertemporel en droit international public", *Annuaire de l'Institut de droit international*, vol. 56 (Wiesbaden session, 1975), pp. 536 *et seq.* (www.idi-iil.org).

[717] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, decision of 21 October 1994, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), pp. 3-149, at p. 43, para. 130; see also, with respect to the term "watershed", *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at pp. 16-22.

[718] *Kasikili/Sedudu Island* (see footnote 395 above), at pp. 1060-1062, paras. 21 and 25.

[719] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)*, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 83-195, p. 110, para. 3.5.

[720] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 338 and 339, para. 48, and p. 346, para. 59.

[721] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 432 above), at p. 31, para. 53.

[722] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77; Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 478.

[723] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 243, para. 66.

[724] WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (US — Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, para. 130.

[725] See United Nations Convention on the Law of the Sea, 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 153, para. 4, and art. 4, para. 4 in annex III.

[726] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area* (see footnote 396 above), at para. 117.

[727] *Ibid.*, para. 211.

[728] *Tyrer v. the United Kingdom*, no. 5856/72, ECHR Series A, no. 26, para. 31.

with its so-called *pro homine* approach.[729] In the *Iron Rhine* case, the continued viability and effectiveness of a multidimensional cross-border railway arrangement was an important reason for the Arbitral Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.[730]

(8) In the final analysis, most international courts and tribunals have not recognized evolutive interpretation as a separate form of interpretation, but instead have arrived at such an evolutive interpretation in application of the various means of interpretation that are mentioned in articles 31 and 32 of the 1969 Vienna Convention, by considering certain criteria (in particular those mentioned in paragraph (6) above) on a case-by-case basis. Any evolutive interpretation of the meaning of a term over time must therefore result from the ordinary process of treaty interpretation.[731]

(9) The Commission considers that this state of affairs confirms its original approach to treaty interpretation:

> "… the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation … making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty".[732]

Accordingly, draft conclusion 8 [3], by using the phrase "presumed intention", refers to the intention of the parties as determined through the application of the various means of interpretation that are recognized in articles 31 and 32. The "presumed intention" is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.

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[729] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (see footnote 431 above), para. 114 ("This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989) and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions") (footnotes omitted).

[730] See *Arbitration regarding the Iron Rhine* (see footnote 397 above), at para. 80: "In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway"; and also *Aegean Sea Continental Shelf* case (see footnote 722 above), at p. 32, para. 77; *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Award, 31 July 1989, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 119-213, at pp. 151-152, para. 85.

[731] As the Study Group on fragmentation of international law has phrased it in its 2006 report, "[t]he starting-point must be … the fact that deciding [the] issue [of evolutive interpretation] is a matter of interpreting the treaty itself" (see A/CN.4/L.682 and Corr.1, para. 478).

[732] *Yearbook … 1964*, vol. II, document A/5809, pp. 204-205, para. (15); see also para. (13), "[p]aragraph 3 specifies as further authentic elements of interpretation: (*a*) agreements between the parties regarding the interpretation of the treaty, and (*b*) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation" (*ibid.*, pp. 203-204); on the other hand, Waldock in his third report on the law of treaties explained that *travaux préparatoires* are not, as such, an authentic means of interpretation (*ibid.*, document A/CN.4/167 and Add.1-3, pp. 58-59, para. (21)).

(10) Draft conclusion 8 [3] does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general (see above commentary, at paragraph (4)). The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach. For this purpose, draft conclusion 8 [3] points to subsequent agreements and subsequent practice as means of interpretation that may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.[733]

(11) This approach is based on and confirmed by the jurisprudence of the International Court of Justice and other international courts and tribunals. In the *Namibia* Advisory Opinion, the International Court of Justice referred to the practice of United Nations organs and of States in order to specify the conclusions that it derived from the inherently evolutive nature of the right to self-determination.[734] In the *Aegean Sea* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial status" was confirmed by the administrative practice of the United Nations and by the behaviour of the party that had invoked the restrictive interpretation in a different context.[735] In any case, the decisions in which the International Court of Justice has undertaken an evolutive interpretation have not strayed from the possible meaning of the text and from the presumed intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.[736]

(12) The judgment of the International Court of Justice in *Dispute regarding Navigational and Related Rights* also illustrates how subsequent agreements and subsequent practice of the parties can assist in determining whether a term has to be given a meaning that is capable of evolving over time. Interpreting the term "comercio" in a treaty of 1858, the Court held:

> "On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was … to give the terms used … a meaning or content capable of evolving, not one

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[733] See also Gardiner, *Treaty Interpretation* (above footnote 392), at pp. 292-294; R. Kolb, *Interprétation et création du droit international* (see footnote 524 above), pp. 488-501; J. Arato, "Subsequent practice and evolutive interpretation", *The Law & Practice of International Courts and Tribunals*, vol. 9-3 (2010), pp. 443-494, at pp. 444-445, 465 *et seq.*

[734] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 432 above), at pp. 30-31, paras. 49-51.

[735] *Aegean Sea Continental Shelf* case (see footnote 722 above), at p. 31, para. 74.

[736] See also *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal* (see footnote 730 above), at pp. 151-152, para. 85.

> fixed once and for all, so as to make allowance for, among other things, developments in international law."[737]

The Court then found that the term "comercio" was a "generic term" of which "the parties necessarily" had "been aware that the meaning … was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed … to have intended" this term to "have an evolving meaning".[738] Judge Skotnikov, in a Separate Opinion, while disagreeing with this reasoning, ultimately arrived at the same result by accepting that a more recent subsequent practice of Costa Rica related to tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation" and concluded that this "suggests that the parties have established an agreement regarding its interpretation".[739]

(13) The International Criminal Tribunal for the former Yugoslavia has sometimes taken more general forms of State practice into account, including trends in the legislation of States that, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Prosecutor v. Furundžija*,[740] for example, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,[741] article 76, paragraph 1, of the first Additional Protocol (Protocol I)[742] and article 4, paragraph 2 (e), of the second Additional Protocol (Protocol II),[743] examined the principles of criminal law common to the major legal systems of the world and held:

> "… that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault …."[744]

(14) The "living instrument" approach of the European Court of Human Rights is also based, *inter alia*, on different forms of subsequent practice.[745] While the Court does not generally require "the agreement of the parties regarding its interpretation" in the sense of article 31, paragraph 3 (b), the decisions in which it adopts an evolutive approach are

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[737] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 242, para. 64.

[738] *Ibid.*, paras. 66-68.

[739] *Ibid.*, Separate Opinion of Judge Skotnikov, p. 283, at p. 285, paras. 9-10.

[740] *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, 10 December 1998, case No. IT-95-17/1-T, ICTY *Judicial Reports 1998*, vol. I, paras. 165 *et seq.*

[741] United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

[742] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, no. 17512, p. 3.

[743] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, no. 17513, p. 609.

[744] See *Prosecutor v. Anto Furundžija* (footnote 740 above), para. 179; similarly *The Prosecutor v. Alfred Musema*, International Criminal Tribunal for Rwanda, Trial Chamber I, Judgment, 27 January 2000, case No. ICTR-96-13-A, paras. 220 *et seq.*, in particular para. 228.

[745] See Nolte, "Jurisprudence under special regimes …" (footnote 398 above), at pp. 246 *et seq.*

regularly supported by an elaborate account of subsequent (State, social and international legal) practice.[746]

(15) The Inter-American Court of Human Rights, despite its relatively rare mentioning of subsequent practice, frequently refers to broader international developments, an approach that falls somewhere between subsequent practice and other "relevant rules" under article 31, paragraph 3 (c).[747] In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, for example, the Court pointed out that:

> "… human rights treaties are live instruments ["instrumentos vivos"] whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[748]

(16) The Human Rights Committee also on occasion adopts an evolutive approach that is based on developments of State practice. Thus, in *Judge v. Canada*, the Committee abandoned its *Kindler*[749] jurisprudence, elaborating that:

> "The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out."[750]

In *Yoon and Choi*, the Committee stressed that the meaning of any right contained in the International Covenant on Civil and Political Rights[751] evolved over time and concluded that article 18, article 3, now provided at least some protection against being forced to act against genuinely held religious beliefs. The Committee reached this conclusion since "an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service".[752]

(17) Finally, the tribunals established under the auspices of the International Centre for the Settlement of Investment Disputes have emphasized that subsequent practice can be a particularly important means of interpretation for such provisions that the parties to the treaty intended to evolve in the light of their subsequent treaty practice. In the case of

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[746] *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, ECHR 2005-IV, para. 163; *VO v. France* [GC], no. 53924/00, 8 July 2004, ECHR 2004-VIII, paras. 4 and 70; *Johnston and Others. v. Ireland*, no. 9697/82, 18 December 1986, ECHR Series A no. 112, para. 53; *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011, para. 63; *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, paras. 119-120, ECHR 2010 (extracts); *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 76.

[747] See, for example, *Velásquez-Rodríguez v. Honduras*, Judgment, Merits, 29 July 1988, Inter-Am. Ct. H.R. Series C No. 4, para. 151; *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law* (see footnote 431 above), paras. 130-133 and 137.

[748] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, Series C No. 79, para. 146; also see *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion, 14 July 1989, OC-10/89, Series A No. 10, para. 38.

[749] *Kindler v. Canada*, Views, 30 July 1993, Communication No. 470/1991, Human Rights Committee report, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), vol. II, Annex XII, U.

[750] *Judge v. Canada*, Views, 5 August 2002, Communication No. 829/1998, *ibid.*, *Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. II, annex V, G, para. 10.3.

[751] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[752] *Yoon and Choi v. the Republic of Korea*, Views, 3 November 2006, Communication Nos. 1321/2004 and 1322/2004, *ibid.*, *Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, Annex VII, V, para. 8.4.

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, for example, the Tribunal held that:

> "Neither party asserted that the ICSID Convention contains any precise *a priori* definition of '*investment*'. Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment."[753]

(18) The jurisprudence of international courts and tribunals and the pronouncements of expert treaty bodies thus confirm that subsequent agreements and subsequent practice under articles 31 and 32 "may assist in determining" whether or not a "term" shall be given "a meaning which is capable of evolving over time". The expression "term" is not limited to specific words (like "commerce", "territorial status", "rape" or "investment"), but may also encompass more interrelated or cross-cutting concepts (such as "by law" (article 9 of the International Covenant on Civil and Political Rights) or "necessary" (article 18 of the Covenant), as they exist, for example, in human rights treaties). Since the "terms" of a treaty are elements of the rules which are contained therein, the rules concerned are covered accordingly.

(19) In a similar manner, subsequent practice under articles 31, paragraph 3 (b), and 32 has contributed to whether domestic courts arrive at a more evolutive or static interpretation of a treaty. For example, in a case concerning the Convention on the Civil Aspects of International Child Abduction,[754] the New Zealand Court of Appeal interpreted the term "custody rights" as encompassing not only legal rights but also "*de facto* rights". On the basis of a review of legislative and judicial practice in different States and referring to article 31, paragraph 3 (b), the Court reasoned that this practice "evidence[d] a fundamental change in attitudes", which then led it to adopt a modern understanding of the term "custody rights" rather than an understanding "through a 1980 lens".[755] The German Federal Constitutional Court, in a series of cases concerning the interpretation of the North Atlantic Treaty[756] in the light of the changed security context after the end of the Cold War, also held that subsequent agreements and subsequent practice under article 31, paragraph 3 (b), "could acquire significance for the meaning of the treaty" and ultimately held that this had been the case.[757]

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[753] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka BIT), Award and Concurring Opinion, 15 March 2002, ICSID Case No. ARB/00/2, *ICSID Reports*, vol. 6 (2004), p. 308 *et seq.*, at p. 317, para. 33; similarly, *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 27 September 2001, ICSID Case No. ARB/00/5, *ibid.*, p. 419, para. 97.

[754] United Nations, *Treaty Series*, vol. 1343, No. 22514, p. 89.

[755] New Zealand, Court of Appeal, *C v. H* [2009] NZCA 100, paras. 175-177 and 195-196 (Baragwanath J.); see also para. 31 (Chambers J.): "Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came in force in 1980. Article 31 (3) (b) permits a construction that reflects 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'." Similarly, Canada, Supreme Court, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 129 (Cory J.).

[756] United Nations, *Treaty Series*, vol. 34, No. 541, p. 243.

[757] Germany, Federal Constitutional Court, BVerfGE, vol. 90, p. 286, at pp. 363-364, para. 276; *ibid.*, vol. 104, p. 151, at pp. 206-207.

(20) Other decisions of domestic courts have confirmed that subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 do not necessarily support evolutive interpretations of a treaty. In *Eastern Airlines, Inc. v. Floyd et al.*, for example, the United States Supreme Court was confronted with the question of whether the term "bodily injury" in article 17 of the Warsaw Convention of 1929[758] covered not only physical but also purely mental injuries. The Court, taking account of the "post-1929 conduct" and "interpretations of the signatories", emphasized that, despite some initiatives to the contrary, most parties had always continued to understand that the term covered only bodily injuries.[759]

Conclusion 9 [8]

Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 9 [8] identifies some criteria that may be helpful in determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements or subsequent practice must also be determined in relation to other means of interpretation (see draft conclusion 2 [1], paragraph 5).

Paragraph 1 — weight: clarity, specificity and other factors

(2) Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) from a general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term "*inter alia*" indicates that these criteria should not be seen as exhaustive. Other criteria may relate to the time when the agreement or practice occurred,[760] the emphasis given by the parties to a particular agreement or practice or the applicable burden of proof.

(3) The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on their clarity and specificity in relation to the treaty

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[758] Convention for the Unification of Certain Rules regarding International Transport, League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

[759] United States of America, Supreme Court, *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530, pp. 546-549; see also United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, paras. 98 and 125 (Lord Hope).

[760] In the case concerning the *Maritime Dispute (Peru v. Chile)*, the Court privileged the practice that was closer to the date of entry into force, *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 50, para. 126.

concerned.[761] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the WTO Panels and Appellate Body.[762] The award of the ICSID Tribunal in *Plama Consortium Limited v. Republic of Bulgaria* is instructive:

> "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions … It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs."[763]

(4) Whereas the International Court of Justice and arbitral tribunals tend to accord more interpretative weight to rather specific subsequent practice by States, the European Court of Human Rights often relies on broad comparative assessments of the domestic legislation or international positions adopted by States.[764] In this latter context, it should be borne in mind that the rights and obligations under human rights treaties must be correctly transformed, within the given margin of appreciation, into the law, the executive practice and international arrangements of the respective State party. For this purpose, sufficiently strong commonalities in the national legislation of States parties can be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights or obligations sometimes speaks in favour of taking less specific practice into account. For example, in the case of *Rantsev v. Cyprus*, the Court held that:

> "It is clear from the provisions of these two [international] instruments that the Contracting States … have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking … Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive

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[761] Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 642 above), p. 91.

[762] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 532 above), p. 231, at p. 259, para. 74; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, para. 625.

[763] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, *ICSID Review — Foreign Investment Law Journal*, vol. 20, No. 1 (Spring 2005), p. 262, at pp. 323-324, para. 195.

[764] See, for example, *Cossey v. the United Kingdom*, no. 10843/84, 27 September 1990, ECHR Series A no. 184, para. 40; *Tyrer v. the United Kingdom*, no. 5856/72, ECHR Series A, no. 26, para. 31; *Norris v. Ireland*, no. 10581/83, 26 October 1988, ECHR Series A no. 142, para. 46.

> obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context."[765]

(5) On the other hand, in the case of *Chapman v. the United Kingdom*, the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle",[766] but ultimately said that it was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation".[767]

Paragraph 2 — weight: repetition of a practice

(6) Paragraph 2 of draft conclusion 9 [8] deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice also depends on whether and how it is repeated. This formula "whether and how it is repeated" brings in the elements of time and the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (b). The element of time and the character of the repetition also serves to indicate the "grounding" of a particular position of the parties regarding the interpretation of a treaty. Moreover, the non-implementation of a subsequent agreement may also suggest a lack of its weight as a means of interpretation under article 31, paragraph 3 (a).[768]

(7) The question of whether "subsequent practice" under article 31, paragraph 3 (b),[769] requires more than a one-off application of the treaty was addressed by the WTO Appellate Body in *Japan — Alcoholic Beverages II*:

> "… subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation".[770]

(8) This definition suggests that subsequent practice under article 31, paragraph 3 (b), requires more than one "act or pronouncement" regarding the interpretation of a treaty; rather action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty. Such a threshold would imply that subsequent practice under article 31, paragraph 3 (b), requires a broad-based, settled and qualified form of collective practice in order to establish agreement among the parties regarding interpretation.

(9) The International Court of Justice, on the other hand, has applied article 31, paragraph 3 (b), more flexibly, without adding further conditions. This is true, in particular, for its judgment in the case of *Kasikili/Sedudu Island*.[771] Other international courts have

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[765] *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 285; see also paras. 273-274.

[766] *Chapman v. the United Kingdom* [GC], no. 27238/95, 18 January 2001, ECHR 2001-I, para. 93.

[767] *Ibid.*, para. 94.

[768] *Pulp Mills on the River Uruguay* (see footnote 395 above), at p. 63, para. 131.

[769] See above draft conclusion 4, para. 2.

[770] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. E, pp. 12-13 (footnotes omitted).

[771] *Kasikili/Sedudu Island* (see footnote 395 above), at pp. 1075-1076, paras. 47-50 and p. 1087, para. 63; *Territorial Dispute* (see footnote 395 above), at pp. 34-37, paras. 66-71.

mostly followed the approach of the International Court of Justice. This is true for the Iran-United States Claims Tribunal[772] and the European Court of Human Rights.[773]

(10) The difference between the standard formulated by the WTO Appellate Body, on the one hand, and the approach of the International Court of Justice, on the other, is, however, more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication[774] that stated that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent".[775] The formula "concordant, common and consistent" thus provides an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (b), has more or less weight as a means of interpretation in a process of interpretation, rather than require any particular frequency in the practice.[776] The WTO Appellate Body itself on occasion has relied on this nuanced view.[777]

(11) The Commission, while finding that the formula "concordant, common and consistent" may be useful for determining the weight of subsequent practice in a particular case, also considers it as not being sufficiently well established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (b), and as carrying the risk of being misconceived as overly prescriptive. Ultimately, the Commission continues to find that: "The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[778] This implies that a one-off practice of the parties that establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b).[779]

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[772] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at pp. 116-126, paras. 109-133.

[773] *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 73 and 79-82; *Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, paras. 56 and 62; concerning the jurisprudence of ICSID tribunals, see Fauchald (footnote 498 above), p. 345; see also A. Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", *American Journal of International Law*, vol. 104, 2010, pp. 207-215.

[774] Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 137; see also Yasseen, "L'interprétation des traités…" (see footnote 393 above), pp. 48-49; whilst "commune" is taken from the work of the International Law Commission, "d'une certaine constance" and "concordante" are conditions that Yasseen derives through further reasoning; see *Yearbook* ... *1966*, vol. II, document A/6309/Rev.1, pp. 98-99, paras. 17-18 and p. 221-222, para. 15.

[775] Sinclair, *The Vienna Convention* ... (see footnote 393 above); Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at p. 118, para. 114.

[776] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264, at p. 187, para. 169; J.-P Cot, "La conduite subséquente des parties a un traité", *Revue générale de droit international public*, vol. 70, 1966, pp. 644-647 ("valeur probatoire"); Distefano, "La pratique subséquente …" (see footnote 573 above), p. 46; Dörr, "Article 31 …" (see footnote 439 above), p. 556, para. 79; see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*, CR 2012/33, pp. 32-36, paras. 7-19 (Wood), available from www.icj-cij.org/docket/files/137/17218.pdf and CR 2012/36, pp. 13-18, paras. 6-21 (Wordsworth), available from www.icj-cij.org/docket/files/137/17234.pdf.

[777] WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, 22 June 1998, para. 93.

[778] See *Yearbook* ... *1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15); Cot, "La conduite subséquente des parties …" (see footnote 776 above), p. 652.

[779] In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty's interpretation, as a general rule, however, subsequent practice under article 31,

Paragraph 3 — weight of other subsequent practice under article 32

(12) Paragraph 3 of draft conclusion 9 [8] addresses the weight that should be accorded to "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3). It does not address when and under which circumstances such practice can be considered. The WTO Appellate Body has emphasized, in a comparable situation, that those two issues must be distinguished from each other:

> "... we consider that the European Communities conflates the preliminary question of what may qualify as a 'circumstance' of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32."[780]

The Appellate Body also held that:

> "... first, the Panel did *not* examine the classification practice in the European Communities during the Uruguay Round negotiations *as a supplementary means of interpretation* within the meaning of Article 32 of the *Vienna Convention*; and, second, the value of the classification practice as a supplementary means of interpretation ...".[781]

In order to determine the "relevance" of such subsequent practice, the Appellate Body referred to "objective factors":

> "These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty."[782]

(13) Whereas the Appellate Body did not use the term "specificity", it referred to the criteria mentioned above. Instead of clarity, the Appellate Body spoke of "consistency" and stated that consistency should not set a benchmark but rather determine the degree of relevance. "Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession".[783]

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paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, "The development of the law of international organization by the decisions of international tribunals", *Recueil des cours ... 1976*, vol. 152, pp. 377-466, at p. 457; Linderfalk, *On the Interpretation of Treaties* (footnote 446 above), p. 166; C.F. Amerasinghe, "Interpretation of texts in open international organizations", *British Yearbook of International Law 1994*, vol. 65, p. 175, at p. 199; Villiger argues in favour of a certain frequency, but emphasizes that the important point is the establishment of an agreement, Villiger, *Commentary* ... (see footnote 414 above), p. 431, para. 22. Yasseen and Sinclair write that practice cannot "in general" be established by one single act, Yasseen, "L'interprétation des traités ..." (see footnote 393 above), p. 47; Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 137; *cf.* Nolte, "Subsequent agreements and subsequent practice of States ..." (see footnote 440 above), at p. 310.

[780] WTO Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R and Corr.1, and WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 297.

[781] WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 92 (footnote omitted and original emphasis).

[782] *EC — Chicken Cuts* (see footnote 780 above), para. 290 (footnote omitted).

[783] *Ibid.*, para. 307 (footnote omitted and original emphasis); *cf.* also *EC — Computer Equipment* (see footnote 781 above), para. 95.

(14) A further factor that helps determine the relevance under article 32 may be the number of affected states that engage in that practice. The Appellate Body has stated:

> "To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."[784]

Conclusion 10 [9]
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Commentary

Paragraph 1, first sentence — "common understanding"

(1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an "agreement" under subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary,[785] paragraph 1 of draft conclusion 10 [9] intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element that distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32,[786] on the other, is the "agreement" of all the parties regarding the interpretation of the treaty. It is this agreement of the parties that provides the means of interpretation under article 31, paragraph 3,[787] their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.[788]

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[784] *EC — Computer Equipment* (see footnote 781 above), para. 93 (original emphasis).

[785] See above commentary to draft conclusion 4, para. (10).

[786] See above draft conclusions 3 [2] and 4, para. 3.

[787] See Crawford, "A consensualist interpretation of article 31 (3) ..." (footnote 606 above), p. 30: "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)."

[788] See above commentary to draft conclusion 2 [1], paras. (12)-(15); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation" and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 219, para. (8), and p. 220, para. (9).

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, *inter alia*, by the Arbitral Tribunal in the case of *German External Debts*, which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[789]

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.[790] Treaties that are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[791] not every element of the conduct of a State that does not fully fit into a general picture necessarily renders the conduct of that State equivocal. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

> "In the same way, negotiations for a settlement, that did not result in one, could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the Treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that."[792]

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions that the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting Parties", that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 … of the Convention do not permit territorial or substantive restrictions".[793] The Court, applying article 31, paragraph 3 (b), described "such a State practice" as being "uniform and consistent", despite the fact

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[789] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award of 16 May 1980, UNRIAA, vol. XIX, part III, pp. 67-145, pp. 103-104, para. 31; see also *EC — Computer Equipment* (footnote 781 above), para. 95; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau* (footnote 730 above), at p. 175, para. 66.

[790] See above commentary to draft conclusion 7, paras. (12)-(15).

[791] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 532 above), at p. 258, para. 70; Kolb, "La modification d'un traité …" (see footnote 695 above), p. 16.

[792] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264, at p. 188, para. 171.

[793] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 79 and 81.

that it simultaneously recognized that two States possibly constituted exceptions.[794] The decision suggests that interpreters, at least under the European Convention, possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.[795]

(7) The term "agreement" in the 1969 Vienna Convention[796] does not imply any particular requirements of form,[797] including for an "agreement" under article 31, paragraph 3 (a) and (b).[798] The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (a), and a subsequent practice that "establishes the agreement" of the parties under article 31, paragraph 3 (b), the former presupposes a "single common act".[799] There is no requirement that an agreement under article 31, paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations.[800]

(8) For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, the parties must also be aware of and accept that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary".[801] Indeed, only the awareness and acceptance of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3 (a) or (b), as an "authentic" means of

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[794] *Ibid.*, paras. 80 and 82; the case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound by the Convention at all.

[795] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R, adopted 9 May 2006, para. 7.218: "… even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice … this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. … We note that one third party in this proceeding submitted arguments contesting the view of the European Communities … ."

[796] See articles 2, para. 1 (a), 3, 24, para. 2, 39-41, 58 and 60.

[797] See above commentary to draft conclusion 4, para. (5); confirmed by the Permanent Court of Arbitration in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, available at www.pca-cpa.org/showfile.asp?fil_id=2705, p. 47, para. 165; Yasseen, "L'interprétation des traités …" (see footnote 393 above), p. 45; Distefano, "La pratique subséquente …" (see footnote 573 above), p. 47.

[798] See above commentary to draft conclusion 4, para. (5); Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 231-232 and 243-247; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213; Dörr, "Article 31 …" (see footnote 439 above), p. 554, para. 75; R. Gardiner, "The Vienna Convention rules on treaty interpretation", in *The Oxford Guide to Treaties*, D.B. Hollis, ed. (Oxford, Oxford University Press, 2012), pp. 475 and 483.

[799] See above commentary to draft conclusion 4, para. (10); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *International Law Reports*, vol. 105 (1997), p. 1, at pp. 54-56; Fox, "Article 31 (3) (a) and (b) …" (footnote 440 above), p. 63; Gardiner, *Treaty Interpretation* (footnote 392 above), pp. 248-249.

[800] Aust, "The theory and practice of informal international instruments" (see footnote 465 above), pp. 789-790.

[801] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1094, para. 74 ("occupation of the island by the Masubia tribe") and pp. 1077, para. 55 ("Eason Report", which "appears never to have been made known to Germany"); Dörr, "Article 31 …" (see footnote 439 above), p. 560, para. 88.

interpretation.[802] In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level.

Paragraph 1, second sentence — possible legal effects of agreement under article 31, paragraph 3 (a) and (b)

(9) The aim of the second sentence of paragraph 1 is to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding,[803] in contrast to other provisions of the 1969 Vienna Convention in which the term "agreement" is used in the sense of a legally binding instrument.[804]

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression "any subsequent practice which establishes the understanding [emphasis added] of the parties".[805] The expression "understanding" indicates that the term "agreement" in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.[806] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[807] An "agreement" under article 31, paragraph 3 (a), being distinguished from an agreement under article 31, paragraph 3 (b), only in form and not in substance, equally need not be legally binding.[808]

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[802] In this respect, the ascertainment of subsequent practice under article 31, para. 3 (b), may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, "Subsequent practice, practices ..." (footnote 415 above), pp. 53-55.

[803] See above commentary to draft conclusion 4, para. (6); P. Gautier, "Non-binding agreements", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), para. 14; Benatar, "From probative value to authentic interpretation ..." (see footnote 440 above), at pp. 194-195; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 244; see also Nolte, "Subsequent agreements and subsequent practice of States ..." (footnote 440 above), p. 307, at p. 375.

[804] See articles 2, para. 1 (a), 3, 24, para. 2, 39-41, 58 and 60.

[805] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).

[806] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264, at p. 187, para. 169; *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, *ibid.*, vol. XIX, pp. 67-145, pp. 103-104, para. 31; Karl, *Vertrag und spätere Praxis ...* (see footnote 454 above), pp. 190-195; Kolb, "La modification d'un traité ..." (see footnote 695 above), pp. 25-26; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), pp. 169-171.

[807] *Official Records of the United Nations Conference on the Law of Treaties ...* (A/CONF.39/11) (see footnote 575 above), thirty-first meeting, 19 April 1968, p. 169, at para. 59 (Australia); P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, N. Angelet, ed. (Brussels, Bruylant, 2007), pp. 425-454, at pp. 430-431 ("La lettre [a] du paragraphe 3 fait référence à un accord interprétatif et l'on peut supposer que le terme 'accord' est ici utilisé dans un sens générique, qui ne correspond pas nécessairement au 'traité' défini à l'article 2 de la convention de Vienne. Ainsi, l'accord interprétatif ultérieur pourrait être un accord verbal, voire un accord politique").

[808] See Gautier, "Non-binding agreements" (footnote 803 above), para. 14; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 211, 213.

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty[809] or, in other words, adopt a certain "understanding" of the treaty.[810] Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[811] Accordingly, international courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.[812] Similarly, memoranda of understanding have been recognized, on occasion, as "a potentially important aid to interpretation" — but "not a source of independent legal rights and duties".[813]

(12) Some members considered, on the other hand, that the term "agreement" has the same meaning in all provisions of the 1969 Vienna Convention. According to those members, this term designates any understanding that has legal effect between the States concerned and the case law referred to in the present commentary does not contradict this definition. Such a definition would not prevent taking into account, for the purpose of interpretation, a legally non-binding understanding under article 32.

Paragraph 2 — forms of participation in subsequent practice

(13) The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). The second sentence clarifies that acceptance of such practice by those parties not engaged in the practice can under certain circumstances be brought about by silence or inaction.

(14) From the outset, the Commission has recognized that an "agreement" deriving from subsequent practice under article 31, paragraph 3 (b), can result, in part, from silence or

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[809] This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission's guide to practice on reservations to treaties (see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10*, A/66/10/Add.1, paras. (18) and (19)).

[810] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, paras. (15) and (16) (uses of the term "understanding" both in the context of what became article 31, para. 3 (a), as well as what became article 31, para. 3 (b)).

[811] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, UNRIAA, vol. XXIV (Sales No. E/F.04.V.18), pp. 1-359, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments" (see footnote 465 above), pp. 787 and 807; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), p. 173; Hafner, "Subsequent agreements and practice …" (see footnote 655 above), pp. 110-113; Gautier, "Les accords informels et la Convention de Vienne …" (see footnote 807 above), p. 434.

[812] For example, "… pattern implying the agreement of the parties regarding its interpretation …" (WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, section E, p. 13); or "… pattern … must imply *agreement* on the interpretation of the relevant provision" (WTO Panel Report, *European Communities and its member States — Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R and WT/DS377/R, adopted 21 September 2010, para. 7.558); or "… practice [that] reflects an agreement as to the interpretation …" (Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at p. 119, para. 116); or that "… State practice" was "… indicative of a lack of any apprehension on the part of the Contracting States …" (*Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62).

[813] *United States-United Kingdom Arbitration concerning Heathrow Airport* (see footnote 811 above), at p. 131, para. 6.7; see also *Arbitration regarding the Iron Rhine* (see footnote 397 above), at p. 98, para. 157.

inaction by one or more parties. Explaining why it used the expression "the understanding of the parties" in draft article 27, paragraph 3 (b) (which later became "the agreement" in article 31, paragraph 3 (b) (see paragraph (10) above)) and not the expression "the understanding of *all* the parties", the Commission stated that:

> "It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[814]

(15) The International Court of Justice has also recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the *Temple of Preah Vihear*, that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[815] This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions,[816] and supported generally by writers.[817] The "circumstances" that will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[818]

(16) The Court of Arbitration in the *Beagle Channel* case[819] dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held:

> "The terms of the Vienna Convention do not specify the ways in which 'agreement' may be manifested. In the context of the present case the acts of jurisdiction were

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[814] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).

[815] *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at p. 23.

[816] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor v. Anto Furundžija* (see footnote 740 above), paras. 165 *et seq.*, at para. 179; *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 285; cautiously: WTO Appellate Body Report, *EC — Chicken Cuts* WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 272; see, also, for a limited holding, Iran-United States Claims Tribunal, Award No. 30-16-3, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation, Iran-United States Claims Tribunal Reports*, vol. 2 (1983), p. 141, at p. 144; *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, UNRIAA, vol. XIX, pp. 67-145, pp. 103-104, para. 31.

[817] Kamto, "La volonté de l'État en droit international" (see footnote 533 above), pp. 134-141; Yasseen, "L'interprétation des traités ..." (see footnote 393 above), p. 49; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 267; Villiger, *Commentary ...* (see footnote 414 above), p. 431, para. 22; Dörr, "Article 31 ..." (see footnote 439 above), pp. 557 and 559, paras. 83 and 86.

[818] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675-676, paras. 99-101; Kamto, "La volonté de l'État en droit international" (see footnote 533 above), p. 136.

[819] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264.

> not intended to establish a source of title independent of the terms of the treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves."[820]

In the same case, the Court of Arbitration considered that:

> "The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty — nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the Treaty."[821]

(17) The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice held that:

> "Some of these activities — the organization of public health and education, policing, the administration of justice — could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria."[822]

(18) This judgment suggests that in cases that concern treaties delimiting a boundary the circumstances will only very exceptionally call for a reaction with respect to conduct that runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.[823]

(19) The relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case. Decisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established.

(20) International courts and tribunals, for example, have been reluctant to accept that parliamentary proceedings or domestic court judgments are considered as subsequent practice under article 31, paragraph 3 (b), to which other parties to the treaty would be

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[820] *Ibid.*, at p. 187, para. 169 (a).

[821] *Ibid.*, para. 171.

[822] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 352, para. 67.

[823] *Ibid.*, at p. 351, para. 64: "… The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited …, it … follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*"; see also *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 730 above), at p. 181, para. 70.

expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[824]

(21) Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State that did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[825] The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken at the political level. At a more general level, the WTO Appellate Body has held that:

> "… in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it."[826]

The International Tribunal for the Law of the Sea has confirmed this approach. Taking into account the practice of States in interpreting articles 56, 58 and 73 of the United Nations Convention on the Law of the Sea, the Tribunal stated:

> "The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with."[827]

(22) Decisions by domestic courts have also recognized that silence on the part of a party to a treaty can only be taken to mean acceptance "if the circumstances call for some reaction".[828] Such circumstances have sometimes been recognized in certain cooperative contexts, for example under a bilateral treaty that provides for a particularly close form of cooperation.[829] This may be different if the cooperation that is envisaged by the treaty takes place in the context of an international organization whose rules preclude using the practice of the parties, and their silence for the purpose of interpretation.[830]

(23) The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common

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[824] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 395 above), at p. 650, para. 48; WTO Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 334 ("… mere access to a published judgment cannot be equated with acceptance …").

[825] *Kasikili/Sedudu Island* (see footnote 395 above), at pp. 1089-1091, paras. 65-68.

[826] WTO Appellate Body Report, *EC — Chicken Cuts* (see footnote 824 above), para. 272 (footnote omitted).

[827] *The M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, *ITLOS Reports 2014*, para. 218.

[828] Switzerland, Federal Court, judgment of 17 February 1971, BGE, vol. 97 I, p. 359, at pp. 370-371.

[829] See United States, Supreme Court, *O'Connor et ux. v. United States*, 479 U.S. 27, at pp. 33-35; Germany, Federal Constitutional Court, BVerfGE, vol. 59, p. 63, at pp. 94-95.

[830] See United Kingdom, Supreme Court: on the one hand, *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, paras. 68-71 (Lord Phillips); and, on the other, *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71, paras. 39-43 (Lord Mance).

agreement, but may also play a role for the operation of non-consent-based rules, such as estoppel, preclusion or prescription.[831]

(24) Once established, an agreement between the parties under article 31, paragraph 3 (a) and (b), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[832] Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

(25) It is also possible for a disagreement to arise between the parties regarding the interpretation of a treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations that have been created by a common interpretation.[833] On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice "do reduce in a major way the significance of the practice after that date", without, however, diminishing the significance of the previous common practice.[834]

Part Four
Specific aspects

Conclusion 11 [10]
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

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[831] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at p. 182 (Dissenting Opinion of Judge Spender).

[832] Hafner, "Subsequent agreements and practice …" (see footnote 655 above), p. 118; this means that the interpretative effect of an agreement under article 31, para. 3, does not necessarily go back to the date of the entry into force of the treaty, as Yasseen maintains, "L'interprétation des traités…" (see footnote 393 above), p. 47.

[833] Karl, *Vertrag und spätere Praxis* ... (see footnote 454 above), p. 151.

[834] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 52, para. 142.

Commentary

(1) Draft conclusion 11 [10] addresses a particular form of action by States that may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.[835]

Paragraph 1 — definition of Conferences of States Parties

(2) States typically use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation.[836] Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (for example, meetings of the States parties of the World Trade Organization, the Organization for the Prohibition of Chemical Weapons or the International Civil Aviation Organization).[837] Such Conferences of States Parties do not fall within the scope of draft conclusion 11 [10], which does not address the subsequent practice of and within international organizations.[838] Second, other Conferences of States Parties are convened pursuant to treaties that do not establish an international organization; rather, the treaty simply provides for more or less periodic meetings of the States parties for their review and implementation. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention,[839] the Review Conference under article VIII, paragraph 3, of the 1968 Non-Proliferation Treaty,[840] and Conferences of States Parties established by

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[835] Other designations include: Meetings of the Parties or Assemblies of the States Parties.

[836] See V. Röben, "Conference (Meeting) of States Parties", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), p. 605; R.R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *American Journal of International Law*, vol. 94, No. 4 (2000), pp. 623-659; J. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", *Leiden Journal of International Law*, vol. 15, No. 1 (2002), pp. 1-52; A. Wiersema, "The new international law-makers? Conference of the Parties to multilateral environmental agreements", *Michigan Journal of International Law*, vol. 31, No. 1 (2009), pp. 231-287; L. Boisson de Chazournes, "Environmental treaties in time", *Environmental Policy and Law*, vol. 39, No. 6 (2009), pp. 293-298.

[837] Marrakesh Agreement establishing the World Trade Organization (1994) (see footnote 445 above); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) (see footnote 545 above); Convention on International Civil Aviation (Chicago Convention, 1944), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[838] See draft conclusion 12 [11] below.

[839] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972) (see footnote 545 above), art. XI. According to this mechanism, States parties meeting in a review conference shall "… review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention … are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

[840] Treaty on the Non-Proliferation of Nuclear Weapons (1968), United Nations, *Treaty Series*, vol. 729, No. 10485, p. 161; art. VIII, para. 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "… in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realised". By way of such decisions, States parties review the operation of the

international environmental treaties.[841] The International Whaling Commission under the International Convention for the Regulation of Whaling[842] is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the *Whaling in the Antarctic* case.[843]

(3) Since Conferences of States Parties are usually established by treaties they are, in a sense, "treaty bodies". However, they should not be confused with bodies that are comprised of independent experts or bodies with a limited membership. Conferences of States Parties are more or less periodical meetings that are open to all of the parties of a treaty.

(4) In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term "Conference of States Parties" for the purpose of these draft conclusions, which only excludes action of States as members of an organ of an international organization (which will be the subject of a later draft conclusion).

Paragraph 2, first sentence — legal effect of decisions

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself and decisions under amendment procedures.[844]

(6) The powers of a Conference of States Parties can be contained in general clauses or in specific provisions, or both. For example, article 7, paragraph 2, of the United Nations Framework Convention on Climate Change begins with the following general language,

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Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

[841] Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change (1992) (United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107), the CMP Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol, 1997) (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 161) and the Conference of the Contracting Parties of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention, 1971) (United Nations, *Treaty Series*, vol. 996, No. 14583, p. 245).

[842] The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides the International Whaling Commission with features that fit the present definition of a Conference of States Parties.

[843] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[844] Convention on Wetlands of International Importance especially as Waterfowl Habitat: art. 6, para. 1, on review functions and art. 10 *bis*, on amendments; United Nations Framework Convention on Climate Change, art. 7, para. 2, on review powers, and art. 15, on amendments; Kyoto Protocol, art. 13, para. 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, art. 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243), art. XI on Conference of the Parties, and art. XVII on amendment procedures; Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control (United Nations, *Treaty Series*, vol. 2302, No. 41032, p. 166), art. 23, para. 5 (review powers), art. 28 (amendments) and art. 33 (protocols).

before enumerating 13 specific tasks for the Conference, one of which concerns examining the obligations of the Parties under the treaty:

> "The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing "guidelines" for the implementation of particular treaty provisions[845] or defining "the relevant principles, modalities, rules and guidelines" for a treaty scheme.[846]

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit acceptance and opt-out procedures[847] that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.[848]

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides" (see for example, articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the 1969 Vienna Convention). The word "any" clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.[849]

Paragraph 2, second sentence — decisions as possibly embodying a subsequent agreement or subsequent practice

(10) The second sentence of paragraph 2 recognizes that decisions of Conferences of States Parties may constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the 1969 Vienna Convention. Decisions adopted within the framework of Conferences of States Parties can perform an important function for determining the Parties' common understanding of the meaning of the treaty.

(11) Decisions of Conferences of States Parties, *inter alia*, may constitute or reflect subsequent agreements under article 31, paragraph 3 (a), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has regularly adopted "understandings and additional agreements" regarding the interpretation of the Convention's provisions. These agreements have been adopted by States parties within the framework of the review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they

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[845] Arts. 7 and 9 of the World Health Organization Framework Convention on Tobacco Control.

[846] Art. 17 of the Kyoto Protocol provides an example, see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements ..." (footnote 836 above), p. 639; J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben, eds. (Berlin, Springer, 2005), pp. 110-115.

[847] See J. Brunnée, "Treaty amendments", in Hollis, *The Oxford Guide to Treaties* (footnote 798 above), pp. 354-360.

[848] *Ibid.*

[849] This is the case, for example, for the United Nations Framework Convention on Climate Change.

arose".[850] Through these understandings, States parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit[851] defines an "additional agreement" as one which:

> (i) Interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (ii) Provides instructions, guidelines or recommendations on how a provision should be implemented.[852]

(12) Similarly, the Conference of States Parties under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention)[853] has adopted resolutions interpreting that Convention. The IMO Sub-Division for Legal Affairs, upon a request from the governing bodies, opined as follows in relation to an "interpretative resolution" of the Conference of States Parties under the London Dumping Convention:

> "According to article 31 (3) (a) of the Vienna Convention on the Law of Treaties … subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the Parties, or even a decision recorded in the summary records of a meeting of the Parties."[854]

(13) In a similar vein, the World Health Organization (WHO) Legal Counsel has stated in general terms that:

> "Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty,' as stated in Article 31 of the Vienna Convention."[855]

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[850] See P. Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", *Journal of Conflict and Security Law*, vol. 15, No. 1 (2010), pp. 25-43, at p. 33.

[851] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence-building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), Part. III (decisions and recommendations), para. 5).

[852] See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional understandings and agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5) (updated later to include the understandings and agreements reached by that Conference, Geneva, 2012).

[853] United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 120.

[854] Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs, document LC 33/J/6, para. 3.

[855] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol

(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements[856] and have observed that:

> "Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty."[857]

(15) The International Court of Justice has held with respect to the role of the International Whaling Commission under the International Convention for the Regulation of Whaling:

> "Article VI of the Convention states that '[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention'. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[858]

(16) The following examples from the practice of Conferences of States Parties support the proposition that decisions by such Conferences may embody subsequent agreements under article 31, paragraph 3 (a).

(17) Article I, paragraph 1, of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> "microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes."

(18) At the third Review Conference (1991), States parties specified that the prohibitions established in this provision relate to "microbial or other biological agents or toxins harmful to plants and animals, as well as humans".[859]

(19) Article 4, paragraph 9, of the Montreal Protocol on Substances that Deplete the Ozone Layer[860] has given rise to a debate about the definition of its term "State not party to this Protocol". According to Article 4, paragraph 9:

> "For the purposes of this Article, the term 'State not party to this Protocol' shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance."

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on illicit trade in tobacco products (FCTC/COP/INB-IT/3/INF.DOC./6) annex, para. 8; S.F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39 (2010), pp. 121-183.

[856] D.H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford, Oxford University Press, 2011), p. 83 (with respect to the Non-Proliferation Treaty); Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 213-214.

[857] B.M. Carnahan, "Treaty review conferences", *American Journal of International Law*, vol. 81, No. 1 (1987), pp. 226-230, at p. 229.

[858] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[859] Final Declaration of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 9-27 September 1991 (BWC/CONF.III/23, part II).

[860] United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3.

(20) In the case of hydro chlorofluorocarbons, two relevant amendments to the Montreal Protocol[861] impose obligations that raised the question of whether a State, in order to be "not party to this Protocol", has to be a non-party with respect to both amendments. The Meeting of the Parties decided that:

> "The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments."[862]

(21) Whereas the acts that are the result of a tacit acceptance procedure[863] are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (a), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the London Dumping Convention. At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.[864] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[865] The amendment refers to and builds on a resolution that was adopted by the Consultative Meeting held three years earlier, which had established the agreement of the parties that: "The London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-sea-

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[861] Copenhagen Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1992), United Nations, *Treaty Series*, vol. 1785, No. 26369, p. 517; and Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1999), *ibid.*, vol. 2173, No. 26369, p. 183.

[862] For details, see decision XV/3 on obligations of parties to the 1999 Beijing Amendment under art. 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons; the definition itself is formulated as follows: "… (a) The term 'State not party to this Protocol' in article 4, paragraph 9, does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term 'State not party to this Protocol,' paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of 'State not party to this Protocol' until the conclusion of the Seventeenth Meeting of the Parties" (Report of the 15th meeting of the State Parties to the Montreal Protocol on Substances that deplete the Ozone Layer (UNEP/OzL.Pro.15/9), chap. XVIII. sect. A, decision XV/3, para. 1).

[863] See above para. (8) of the present commentary.

[864] See London Sixteenth Consultative Meeting of the Contracting Parties, and resolutions LC.49 (16), LC.50 (16) and LC.51 (16) (United Nations, *Treaties Series*, vol. 1775, No. 15749, p. 395). First, the meeting decided to amend the phasing-out of the dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And, finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see also "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (July 1997), p. 11).

[865] It has even been asserted that these amendments to annex I of the London Dumping Convention "constitute major changes in the Convention" (see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (footnote 836 above), p. 638).

bed repositories accessed from the sea."[866] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling".[867] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(22) The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[868] provides in Article 17, paragraph 5, that: "Amendments … shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted [them] …". Led by an Indonesian-Swiss initiative, the Conference of the Parties decided to clarify the requirement of the acceptance by three fourths of the Parties, by agreeing:

> "… without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment."[869]

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of States Parties to any convention are "the ultimate authority as to its interpretation".[870] While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (a), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result.[871] It should also be noted that the delegation of Japan, requesting that this position be reflected in the Conference's Report, stated that it "supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in a legal advice provided by the United Nations Office of Legal Affairs as the Depositary,[872] and had accepted the fixed-time approach enunciated in the decision on the Indonesian-Swiss country-led initiative *only in this particular instance*."[873]

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[866] IMO, Report of the Thirteenth Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, LDC 13/15, annex 7, resolution LDC.41 (13), para. 1.

[867] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (see footnote 836 above), p. 641.

[868] United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57.

[869] See Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (Cartagena, Colombia, 17-21 October 2011), UNEP/CHW.10/28, annex I, Decision BC-10/3 (Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention), para. 2.

[870] *Ibid.*, chap. III. A, para. 65.

[871] See Günther Handl, "International 'lawmaking' by conferences of the parties and other politically mandated bodies", in Wolfrum and Röben, *Developments of International Law in Treaty Making* (footnote 846 above), pp. 127-143, at p. 132.

[872] The "current-time approach" favoured by the Legal Counsel of the United Nations stipulates that: "Where the treaty is silent or ambiguous on the matter, the practice of the Secretary-General is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment." See extracts from the memorandum of 8 March 2004 received from the Office of Legal Affairs of the United Nations, available at www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx.

(23) The preceding examples demonstrate that decisions of Conferences of States Parties may embody under certain circumstances subsequent agreements under article 31, paragraph 3 (a), and give rise to subsequent practice under articles 31, paragraph 3 (b), or to other subsequent practice under article 32 if they do not reflect agreement of the parties. The respective character of a decision of a Conference of States Parties, however, must always be carefully identified. For this purpose, the specificity and the clarity of the terms chosen in the light of the text of the Conference of States Parties' decision as a whole, its object and purpose, and the way in which it is applied, need to be taken into account. The parties often do not intend that such a decision has any particular legal significance.

Paragraph 2, third sentence — decisions as possibly providing a range of practical options

(24) The last sentence of paragraph 2 of draft conclusion 11 [10] reminds the interpreter that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty. Those decisions may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation, even if the decision is by consensus. Indeed, Conferences of States Parties often do not explicitly seek to resolve or address questions of interpretation of a treaty.

(25) A decision by the Conference of States Parties to the WHO Framework Convention on Tobacco Control provides an example. Articles 9 and 10 of the Convention deal, respectively, with the regulation of the contents of tobacco products, and with the regulation of the disclosure of information regarding the contents of such products. Acknowledging that such measures require the allocation of significant financial resources, the States Parties agreed, under the title of "practical considerations" for the implementation of articles 9 and 10, on "some options that Parties could consider using", such as:

"(a) designated tobacco taxes;

(b) tobacco manufacturing and/or importing licensing fees;

(c) tobacco product registration fees;

(d) licensing of tobacco distributors and/or retailers;

(e) non-compliance fees levied on the tobacco industry and retailers; and

(f) annual tobacco surveillance fees (tobacco industry and retailers)."[874]

This decision provides a non-exhaustive range of practical options for implementing articles 9 and 10 of the Convention. The parties have thereby, however, implicitly agreed that the stated "options" would, as such, be compatible with the Convention.

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[873] Report of the Conference of the Parties to the Basel Convention … (see footnote 869 above), para. 68 (emphasis added).

[874] Partial guidelines for implementation of articles 9 and 10 of the WHO Framework Convention on Tobacco Control (*Regulation of the contents of tobacco products and Regulation of tobacco product disclosures*), FCTC/COP4(10), Annex, adopted at the fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control (Punta del Este, Uruguay, 15-20 November 2010), in FCTC/COP/4/DIV/6, p. 39.

Paragraph 2 as a whole

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (a), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases, the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. They may also produce an effect in combination with a legal duty to cooperate under the treaty, "and the parties thus should give due regard" to such a decision.[875] In any case, it cannot simply be said that because the treaty does not accord the Conference of States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.[876]

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties' decision. Discordant practice following a decision of the Conference of States Parties may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a).[877] Conference of States Parties' decisions that do not qualify as subsequent agreements under article 31, paragraph 3 (a), or as subsequent practice under article 31, paragraph 3 (b), may nevertheless be a subsidiary means of interpretation under article 32.[878]

Paragraph 3 — an agreement regarding the interpretation of the treaty

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts that originate from Conferences of States Parties may have different forms and designations and they may be the result of different procedures. Conferences of States Parties may even operate without formally adopted rules of procedure.[879] If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly

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[875] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[876] *Ibid.*, p. 248, para. 46.

[877] See above commentary to draft conclusion 10 [9], paras. (23)-(24).

[878] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 (Separate Opinion of Judge *ad hoc* Charlesworth, at p. 454, para. 4: "I note that resolutions adopted by a vote of the [International Whaling Commission] have some consequence although they do not come within the terms of [a]rticle 31.3 of the Vienna Convention").

[879] The Conference of States Parties to the United Nations Framework Convention on Climate Change provisionally applies the draft rules of procedure of the Conference of the Parties and its subsidiaries bodies (FCCC/CP/1996/2), with the exception of draft rule 42 in the chapter on "Voting", since no agreement has been reached so far on one of the two voting alternatives contained therein, see Report of the Conference of the Parties on its first session (28 March to 7 April 1995) (FCCC/CP/1995/7), p. 8, para. 10; Report of the Conference of the Parties on its nineteenth session (11 to 23 November 2013) (FCCC/CP/2013/10), p. 6, para. 4; similarly, the Conference of States Parties to the Convention on Biological Diversity (1992, United Nations, *Treaties Series*, vol. 1760, No. 30619, p. 79) did not adopt Rule 40, paragraph 1 (Voting), of the rules of procedure "because of the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance", see Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (8-19 October 2012) (UNEP/CBD/COP/11/35), para. 65.

embody a "subsequent agreement" under article 31, paragraph 3 (a), provided that it is "regarding the interpretation of the treaty".

(29) Conference of States Parties' decisions regarding review and implementation functions, however, are normally adopted by consensus. This practice derives from rules of procedure that usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Provisional Rules of Procedure for the Review Conference of the Parties to the Biological Weapons Convention. According to rule 28, paragraph 2:

> "The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted."[880]

This formula, with only minor variations, has become the standard with regard to substantive decision-making procedures at Conferences of States Parties.

(30) In order to address concerns relating to decisions adopted by consensus, the phrase "including by consensus" was introduced at the end of paragraph 3 in order to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept that necessarily indicates any particular degree of agreement on substance. According to the *Comments on Some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with General Assembly resolution 60/286 of 8 September 2006:[881]

> "Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect 'unanimity' of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded."[882]

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (b). The rules of procedure of Conferences of States Parties do not usually give an indication of the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (a), or a subsequent practice under article 31, paragraph 3 (b). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a), need not be binding as such, the 1969 Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties

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[880] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

[881] See General Assembly resolution 60/286 of 8 September 2006 on revitalization of the General Assembly, requesting the Office of Legal Affairs of the Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (annex, para. 24).

[882] See "Consensus in UN practice: General", paper prepared by the Secretariat, available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf; see also R. Wolfrum and J. Pichon, "Consensus", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 3-4 and 24.

concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[883]

(32) That certain decisions, despite having been declared as being adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (a), is especially true when there exists an objection by one or more States parties to that consensus.

(33) For example, at its Sixth Meeting in 2002, the Conference of States Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[884] After several efforts to reach an agreement had failed, the President of the Conference of States Parties proposed that the decision be adopted and the reservations that Australia had raised be recorded in the final report of the meeting. The representative of Australia, however, reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[885] The President declared the debate closed and, "following established practice", declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place".[886]

(34) In this situation, the Executive Secretary of the Convention on Biological Diversity requested a legal opinion from the United Nations Legal Counsel.[887] The opinion by the Legal Counsel[888] expressed the view that a party could "disassociate itself from the substance or text … of the document [,] indicate that its joining in the consensus does not constitute acceptance of the substance or text of parts of the document[,] and/or present any other restrictions on its Government's position on substance or text of … the document".[889] Thus, it is clear that a decision by consensus can occur in the face of rejection of the substance of the decision by one or more of the States parties.

(35) The decision under the Convention on Biological Diversity, as well as a similar decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to the Climate Change Convention (Bolivia's objection notwithstanding),[890] raise the

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[883] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[884] See report of the sixth meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/6/20), annex I, decision VI/23.

[885] *Ibid.*, para. 313.

[886] *Ibid.*, para. 318; for the discussion see paras. 294-324.

[887] Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[888] Letter dated 17 June 2002, transmitted by facsimile.

[889] *Ibid.*

[890] See report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancún from 29 November to 10 December 2010 (FCCC/KP/CMP/2010/12 and Add.1), decision 1/CMP.6 (The Cancún Agreements: outcome of the work of the Ad hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session) and decision 2/CMP.6 (The Cancún Agreements: land use, land-use change and forestry); as well as the proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, para. 29.

important question of what "consensus" means.[891] However, this question, which does not fall within the scope of the present topic, must be distinguished from the question of whether all the parties to a treaty have arrived at an agreement in substance on matters of interpretation of that treaty under article 31, paragraph 3 (a) and (b). Decisions by Conferences of States Parties that do not reflect agreement in substance among all the parties do not qualify as agreements under article 31, paragraph 3, although they may be a form of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3).

(36) A different issue concerns the legal effect of a decision of a Conference of States Parties once it qualifies as an agreement under article 31, paragraph (3). In 2011, the IMO Sub-Division for Legal Affairs was asked to "advise the governing bodies […] about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision".[892] In its response, while confirming that a resolution by the Conference of States Parties can constitute, in principle, a subsequent agreement under article 31, paragraph 3 (a), the IMO Sub-Division for Legal Affairs advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all the parties.[893]

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (a), would only be binding "as a treaty, or an amendment thereto",[894] it came to the correct conclusion that even if the consensus decision by a Conference of States Parties embodies an agreement regarding interpretation in substance it is not (necessarily) binding upon the parties.[895] Rather, as the Commission has indicated, a subsequent agreement under article 31, paragraph 3 (a), is only one of different means of interpretation to be taken into account in the process of interpretation.[896]

(38) Thus, interpretative resolutions by Conferences of States Parties that are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (a), or subsequent practice under article 31, paragraph 3 (b), if there are sufficient indications that that was the intention of the parties at the time of the adoption of the decision or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty.[897] The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a), but not necessarily treat it as legally binding.[898]

Conclusion 12 [11]
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent

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[891] See Nolte, "Subsequent agreements and subsequent practice of States …" (footnote 440 above), pp. 372-377.

[892] IMO, report of the 3rd meeting of the Intersessional Working Group on Ocean Fertilization (LC 33/4), para. 4.15.2.

[893] IMO, document LC 33/J/6, para. 3 (see footnote 854 above).

[894] *Ibid.*, para. 8.

[895] See above commentary to draft conclusion 10 [9], paras. (9)-(11).

[896] Commentary to draft conclusion 3 [2], para. (4), above.

[897] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, Separate Opinion of Judge Greenwood, at pp. 407-408, para. 6, and Separate Opinion of Judge *ad hoc* Charlesworth, at pp. 453-454, para. 4.

[898] See above commentary to draft conclusion 3 [2], para. 4.

practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Commentary

General aspects

(1) Draft conclusion 12 [11] refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the 1969 Vienna Convention.

(2) Constituent instruments of international organizations are specifically addressed in article 5 of the 1969 Vienna Convention, which provides:

> "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[899]

(3) A constituent instrument of an international organization under article 5, like any treaty, is an international agreement "whether embodied in a single instrument or in two or more related instruments" (article 2, paragraph 1 (a)). The provisions that are contained in such a treaty are part of the constituent instrument.[900]

(4) As a general matter, article 5, by stating that the 1969 Vienna Convention applies to constituent instruments of international organizations without prejudice to any relevant rules of the organization,[901] follows the general approach of the Convention according to which treaties between States are subject to the rules set forth in the Convention "unless the treaty otherwise provides."[902]

(5) Draft conclusion 12 [11] only refers to the interpretation of constituent instruments of international organizations. It therefore does not address every aspect of the role of

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[899] See also the parallel provision of article 5 of the 1986 Vienna Convention (A/CONF.129/15).

[900] Art. 20, para. 3, of the 1969 Vienna Convention requires the acceptance, by the competent organ of the organization, of reservations relating to its constituent instrument. Twelfth report on reservations to treaties, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584, paras. 75-77; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge, Cambridge University Press, 1989), p. 204.

[901] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 191 (draft article 4); K. Schmalenbach, "Art. 5", in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties ...* (see footnote 439 above), p. 89, para. 1.

[902] See, for example, articles 16; 19 (a) and (b); 20, paras. 1 and 3-5; 22; 24, para. 3; 25, para. 2; 44, para. 1; 55; 58, para. 2; 70, para. 1; 72, para. 1; 77, para. 1, of the 1969 Vienna Convention.

subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations that are not themselves constituent instruments of international organizations.[903] In addition, draft conclusion 12 [11] does not apply to the interpretation of decisions by organs of international organizations as such,[904] including to the interpretation of decisions by international courts[905] or to the effect of a "clear and constant jurisprudence"[906] ("*jurisprudence constante*") of courts or tribunals.[907] Finally, the conclusion does not specifically address questions relating to pronouncements by a treaty monitoring body consisting of independent experts, as well as to the weight of particular forms of practice more generally, matters which may be dealt with at a later stage.

Paragraph 1 — applicability of articles 31 and 32

(6) The first sentence of paragraph 1 of draft conclusion 12 [11] recognizes the applicability of articles 31 and 32 of the 1969 Vienna Convention to treaties that are constituent instruments of international organizations.[908] The International Court of Justice has confirmed this point in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> "From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply."[909]

(7) The Court has held with respect to the Charter of the United Nations:

> "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the

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[903] The latter category is addressed by the 1986 Vienna Convention (A/CONF.129/15).

[904] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94 ("… While the rules on treaty interpretation embodied in [a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account"); see also H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989, part eight", *British Yearbook of International Law 1996*, vol. 67, p. 1, at p. 29; M.C. Wood, "The interpretation of Security Council resolutions", *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), p. 73, at p. 85; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 128.

[905] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), *Judgment, I.C.J. Reports 2013*, p. 281, at p. 307, para. 75 ("A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by the subsequent conduct of those States, as provided by the principle stated in article 31, paragraph 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties").

[906] See *Regina v. Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Limited and others* [2001] UKHL 23; *Regina v. Special Adjudicator (respondent) ex parte Ullah (FC) (appellant) Do (FC) (appellant) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 26 [20] (Lord Bingham of Cornhill); *Regina (On the Application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

[907] Such jurisprudence may be a means for the determination of rules of law as indicated, in particular, by article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

[908] Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 281-282.

[909] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74, para. 19.

> interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics."[910]

(8) At the same time, article 5 suggests, and decisions by international courts confirm, that constituent instruments of international organizations are also treaties of a particular type that may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

> "But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[911]

(9) The second sentence of paragraph 1 of draft conclusion 12 [11] more specifically refers to elements of articles 31 and 32 that deal with subsequent agreements and subsequent practice as a means of interpretation and confirms that subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for constituent instruments of international organizations.

(10) The International Court of Justice has recognized that article 31, paragraph 3 (b), is applicable to constituent instruments of international organizations. In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the Court introduced its interpretation of the Constitution of WHO by stating:

> "According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be 'taken into account, together with the context:
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> ...
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> "'(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'."[912]

Referring to different precedents from its own case law in which it had, *inter alia*, employed subsequent practice under article 31, paragraph 3 (b), as a means of interpretation, the Court announced that it would apply article 31, paragraph 3 (b):

> "... in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises 'within the scope of [the] activities' of that Organization."[913]

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[910] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 157.

[911] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19.

[912] *Ibid.*

[913] *Ibid.*

(11) The *Land and Maritime Boundary between Cameroon and Nigeria* case is another decision in which the Court has emphasized, in a case involving the interpretation of a constituent instrument of an international organization,[914] the subsequent practice of the parties. Proceeding from the observation that "Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[915] the Court concluded that:

> "From the treaty texts and the practice [of the parties] analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[916]

(12) Article 31, paragraph 3 (a), is also applicable to constituent treaties of international organizations.[917] Self-standing subsequent agreements between the member States regarding the interpretation of constituent instruments of international organizations, however, are not common. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ of the organization. If there is a need to modify, to amend, or to supplement the treaty, the member States either use the amendment procedure that is provided for in the treaty or they conclude a further treaty, usually a protocol.[918] It is, however, also possible that the parties act as such when they meet within a plenary organ of the respective organization. In 1995:

> "The Governments of the 15 Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions".[919]

That is to say that:

> "… the name given to the European currency shall be Euro. … The specific name Euro will be used instead of the generic term 'ecu' used by the Treaty to refer to the European currency unit."[920]

This decision of the "Member States meeting within" the European Union has been regarded, in the literature, as a subsequent agreement under article 31, paragraph 3 (a).[921]

(13) It is sometimes difficult to determine whether "Member States meeting within" a plenary organ of an international organization intend to act in their capacity as members of that organ, as they usually do, or whether they intend to act in their independent capacity as

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[914] See Art. 17 of the Convention and Statute relating to the Development of the Chad Basin (Treaty of Fort-Lamy von 1964), *Heidelberg Journal of International Law*, vol. 34 (1974), at p. 80; generally: P.H. Sand, "Development of International Water Law in the Lake Chad Basin", *ibid.*, pp. 52-76.

[915] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 305, para. 65.

[916] *Ibid.*, at pp. 306-307, para. 67.

[917] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226; see also below footnote 944 and accompanying text.

[918] See articles 39-41 of the 1969 Vienna Convention.

[919] See Madrid European Council, Conclusions of the Presidency, *European Union Bulletin*, No. 12 (1995), p. 9, at p. 10, sect. I.A.I.

[920] *Ibid.*

[921] See Aust, *Modern Treaty Law and Practice* (footnote 525 above), p. 215; Hafner, "Subsequent agreements and practice …" (see footnote 655 above), at pp. 109-110.

States parties to the constituent instrument of the organization.[922] The Court of Justice of the European Union, when confronted with this question, initially proceeded from the wording of the act in question:

> "It is clear from the wording of that provision that acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court."[923]

Later, however, the Court accorded decisive importance to the "content and all the circumstances in which [the decision] was adopted" in order to determine whether the decision was that of the organ or of the member States themselves as parties to the treaty:

> "Consequently, it is not enough that an act should be described as a 'decision of the Member States' for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council."[924]

(14) Apart from subsequent agreements or subsequent practice that establish the agreement of all the parties under article 31, paragraph 3 (a) and (b), other subsequent practice by one or more parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty.[925] Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[926] Such bilateral treaties are not, as such, subsequent agreements under article 31, paragraph 3 (a), if only because they are concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning the interpretation of the constituent instrument itself and may serve as supplementary means of interpretation under article 32.

Paragraph 2 — subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of member States

(15) Paragraph 2 of draft conclusion 12 [11] highlights a particular way in which subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may "arise from" their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be "expressed in" the practice of an

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[922] P.C.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd edition, L.W. Gormley, ed. (London, Kluwer Law International, 1998), pp. 340-343.

[923] Case C-181/91 and C-248/91, *Parliament v. Council and Commission* [1993], *European Court Reports I-3713*, para. 12.

[924] *Ibid.*, para. 14.

[925] See above draft conclusions 2 [1], para. 4, and 4, para. 3, and commentary thereto, respectively, para. (10) and paras. (23)-(37).

[926] This is true, for example, for the Convention on International Civil Aviation (see footnote 837above); P.P.C. Haanappel, "Bilateral air transport agreements — 1913-1980", *International Trade Law Journal*, vol. 5, No. 2 (1980), pp. 241-267; L. Tomas, "Air transport agreements, regulation of liability", in *Max Planck Encyclopedia of Public International Law* (see footnote 425 above); B.F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Alphen aan den Rijn, Kluwer Law International, 2009), p. 10.

international organization in the application of a constituent instrument. "Arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization (see draft conclusion 4).[927]

(16) In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice recognized the possibility that the practice of an organization may reflect an agreement or the practice of the Member States as parties to the treaty themselves, but found that the practice in that case did not "express or amount to" a subsequent practice under article 31, paragraph 3 (b):

> "Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons."[928]

(17) In this case, when considering the relevance of a resolution of an international organization for the interpretation of its constituent instrument the Court considered, in the first place, whether the resolution expressed or amounted to "a practice establishing agreement between the members of the Organization" under article 31, paragraph 3 (b).[929]

(18) In a similar way, the WTO Appellate Body has stated in general terms:

> "Based on the text of Article 31 (3) (a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law."[930]

(19) Regarding the conditions under which a decision of a plenary organ may be considered to be a subsequent agreement under article 31, paragraph 3 (a), the WTO Appellate Body held:

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[927] R. Higgins, "The Development of international law by the political organs of the United Nations", *Proceedings of the American Society of International Law at its 59th Annual Meeting* (Washington, D.C., April 22-24, 1965), pp. 116-124, at p. 119; the practice of an international organization, in addition to arising from, or being expressed in, an agreement or the practice of the parties themselves under paragraph 2, may also be a means of interpretation in itself under paragraph 3 (see below at paras. (25)-(35)).

[928] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 81, para. 27.

[929] The Permanent Court of International Justice had adopted this approach in its Advisory Opinion on *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, 23 July 1926, *P.C.I.J. Series B. No. 13*, at pp. 19-20; see S. Engel, "'Living' international constitutions and the world court (the subsequent practice of international organs under their constituent instruments)", *International and Comparative Law Quarterly*, vol. 16 (1967), pp. 865-910, at p. 871.

[930] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 262 (original emphasis).

> "263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. … With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.
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> "264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:
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> > Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
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> "265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC — Bananas III (Article 21.5 — Ecuador II)/EC — Bananas III (Article 21.5 — US)*. The Appellate Body observed that the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31 (3) (a) of the *Vienna Convention* as 'a further *authentic element of interpretation* to be taken into account together with the context'. According to the Appellate Body, 'by referring to "authentic interpretation", the ILC reads Article 31 (3) (a) as referring to *agreements bearing specifically upon the interpretation of the treaty*.' Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.
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> …
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> "268. For the foregoing reasons, we *uphold* the Panel's finding … that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31 (3) (a) of the *Vienna Convention*, on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*."[931]

(20) The International Court of Justice, although it did not expressly mention article 31, paragraph 3 (a), when relying on the General Assembly Declaration on Friendly Relations between States for the interpretation of Article 2, paragraph 4, of the Charter, emphasized the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their consent thereto.[932] In this context, a number of writers have

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[931] *Ibid.* (footnotes omitted); although the Doha Ministerial Decision does not concern a provision of the WTO Agreement itself, it concerns an annex to that Agreement (the "TBT Agreement"), which is an "integral part" of the Agreement establishing the WTO (art. 2, para. 2, WTO Agreement).

[932] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188: "… The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the Charter of the United Nations as a treaty ("elucidation"); similarly: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J.*

concluded that subsequent agreements within the meaning of article 31, paragraph 3 (a), may, under certain circumstances, arise from or be expressed in acts of plenary organs of international organizations,[933] such as the General Assembly of the United Nations.[934] Indeed, as the WTO Appellate Body has indicated with reference to the Commission,[935] the characterization of a collective decision as an "authentic element of interpretation" under article 31, paragraph 3 (a), is only justified if the parties of the constituent instrument of an international organization acted as such and not, as they usually do, institutionally as members of the respective plenary organ.[936]

(21) Paragraph 2 refers to the practice of an international organization, rather than to the practice of an organ of an international organization. Although the practice of an international organization can arise from the conduct of an organ, it can also be generated by the conduct of two or more organs.

(22) Subsequent agreements and subsequent practice of the parties, which may "arise from, or be expressed in" the practice of an international organization, may sometimes be very closely interrelated with the practice of the organization as such. For example, in its *Namibia* Advisory Opinion, the International Court of Justice arrived at its interpretation of

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Reports 2010, p. 403, at p. 437, para. 80; in this sense, for example, L.B. Sohn, "The UN system as authoritative interpreter of its law", in *United Nations Legal Order*, vol. 1, O. Schachter and C.C. Joyner, eds. (Cambridge, American Society of International Law/Cambridge University Press, 1995), pp. 169-229, at p. 177 (noting in regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter").

[933] H.G. Schermers and N.M. Blokker, *International Institutional Law*, 5th revised edition (Leiden/Boston, Martinus Nijhoff, 2011), p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); M. Cogen, "Membership, associate membership and pre-accession arrangements of CERN, ESO, ESA, and EUMETSAT", *International Organizations Law Review*, vol. 9 (2012), pp. 145-179, at pp. 157-158 (referring to a unanimously adopted decision of the CERN Council of 17 June 2010 interpreting the admission criteria established in the CERN Convention as a subsequent agreement under article 31, para. 3 (a), of the 1969 Vienna Convention).

[934] See E. Jimémez de Aréchega, "International law in the past third of a century", *Recueil des Cours ... 1978*, vol. 159, pp. 1-334, at p. 32 (stating in relation to the Friendly Relations Declaration that "[t]his Resolution ... constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances, it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members"); O. Schachter, "General course in public international law", *Recueil des Cours ... 1982*, vol. 178, pp. 9-396, at p. 113 ("... [t]he law-declaring resolutions that construed and 'concretized' the principles of the Charter — whether as general rules or in regard to particular cases — may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all Member States, they fitted comfortably into an established source of law."); P. Kunig, "United Nations Charter, interpretation of", in *Max Planck Encyclopedia of Public International Law*, vol. X (www.mpepil.com), p. 273 *et seq.*, at p. 275 (stating that, "[i]f passed by *consensus*, they [that is, General Assembly resolutions] are able to play a major role in the ... interpretation of the UN Charter"); Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213 (mentioning that General Assembly resolution 51/210 on measures to eliminate international terrorism of 17 December 1996 "can be seen as a subsequent agreement about the interpretation of the UN Charter"). All resolutions to which the writers are referring to have been adopted by consensus.

[935] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 265.

[936] Y. Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge, Cambridge University Press, 2014), pp. 114-115.

the term "concurring votes" in Article 27, paragraph 3, of the Charter of the United Nations as including abstentions primarily by relying on the practice of the competent organ of the organization in combination with the fact that this practice was then "generally accepted" by Member States:

> "… the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[937]

In this case, the Court emphasized both the practice of one or more organs of the international organization and the "general acceptance" of that practice by the Member States and characterized the combination of those two elements as being a "general practice of the organization".[938] The Court followed this approach in its Advisory Opinion regarding *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by stating that:

> "The Court considers that the *accepted* practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter."[939]

By speaking of the "accepted practice of the General Assembly",[940] the Court implicitly affirmed that acquiescence on behalf of the Member States regarding the practice followed by the organization in the application of the treaty permits to establish the agreement regarding the interpretation of the relevant treaty provision.[941]

(23) On this basis it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls",[942] in the sense that "where [S]tates by treaty entrust the performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes

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[937] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22.

[938] H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989, Part Two", *British Yearbook of International Law 1990*, vol. 61, pp. 1-133, at pp. 76 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is … rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions").

[939] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 150 (emphasis added).

[940] *Ibid.*

[941] See above commentary to draft conclusion 10 [9], para. 2, second sentence, paras. (13)-(25); Villiger, *Commentary* … (see footnote 414 above), pp. 431-432, para. 22; J. Arato, "Treaty interpretation and constitutional transformation", *Yale Journal of International Law*, vol. 38, No. 2 (2013), pp. 289-357, at p. 322.

[942] Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 281.

agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors".[943]

(24) Accordingly, in the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is both the name of an international organization established by the Convention for the Regulation of Whaling[944] and that of an organ thereof), and clarified that when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule".[945] At the same time, however, the Court also expressed a cautionary note according to which:

> "… Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties."[946]

(25) This cautionary note does not, however, exclude that a resolution that has been adopted without the support of all member States may give rise to, or express, the position or the practice of individual member States in the application of the treaty that may be taken into account under article 32.[947]

The practice of an international organization itself

(26) Paragraph 3 of draft conclusion 12 [11] refers to another form of practice that may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its "own practice", as distinguished from the practice of the member States. The International Court of Justice has in some cases taken the practice of an international organization into account in its interpretation of constituent instruments without referring to the practice or acceptance of the member States of the organization. In particular, the Court has stated that the international organization's "own practice … may deserve special attention" in the process of interpretation.[948]

(27) For example, in its Advisory Opinion on the *Competence of the General Assembly regarding Admission to the United Nations*, the Court stated that:

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[943] *Ibid.*

[944] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge, Cambridge University Press, 2014), pp. 37-38; A. Gillespie, *Whaling Diplomacy: Defining issues in International Environmental Law* (Cheltenham, Edward Elgar, 2005), p. 411.

[945] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[946] *Ibid.*, p. 257, para. 83.

[947] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961 (adopted with 60 votes to 16, with 23 abstentions, including the Soviet Union and other States of Eastern Europe) and resolution 1913 (XVIII) of 13 December 1963 (adopted by 91 votes to 2 (Spain and Portugal)).

[948] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74; See also D. Simon, *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981), pp. 379-384.

> "The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council."[949]

(28) Similarly, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court referred to acts of organs of the organization when it referred to the practice of "the United Nations":

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. ... In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22."[950]

(29) In its *Inter-Governmental Maritime Consultative Organization* Advisory Opinion, the International Court of Justice referred to "the practice followed by the Organization itself in carrying out the Convention" as a means of interpretation.[951]

(30) In its advisory opinion on *Certain Expenses of the United Nations*, the Court explained why the practice of an international organization, as such, including that of a particular organ, may be relevant for the interpretation of its constituent instrument:

> "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'."[952]

(31) Many international organizations share the same characteristic of not providing for an "ultimate authority to interpret" their constituent instrument. The conclusion that the Court has drawn from this circumstance is therefore now generally accepted as being applicable to international organizations.[953] The identification of a presumption, in the *Certain Expenses* advisory opinion, which arises from the practice of an international

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[949] *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[950] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

[951] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169.

[952] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168.

[953] See J. Klabbers, *An Introduction to Institutional Law*, 2nd edition (Cambridge, Cambridge University Press, 2009), p. 90; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge, Cambridge University Press, 2005), p. 25; J.E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press, 2006), p. 80; Rosenne, *Developments in the Law of Treaties ...* (see footnote 900 above), pp. 224-225.

organization, including by one or more of its organs, is a way of recognizing such practice as a means of interpretation.[954]

(32) Whereas it is generally agreed that the interpretation of the constituent instruments of international organizations by the practice of their organs constitutes a relevant means of interpretation,[955] certain differences exist among writers about how to explain the relevance, for the purpose of interpretation, of an international organization's "own practice" in terms of the Vienna rules of interpretation.[956] Such practice can, at a minimum, be conceived as a supplementary means of interpretation under article 32.[957] The Court, by referring to acts of international organizations that were adopted against the opposition of certain member states,[958] has recognized that such acts may constitute practice for the purposes of interpretation, but generally not a (more weighty) practice that establishes agreement between the parties regarding the interpretation and that would fall under article 31, paragraph 3. Writers largely agree, however, that the practice of an international organization, as such, will often also be relevant for clarifying the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[959]

(33) The Commission has confirmed, in its commentary to draft conclusion 2 [1], that given instances of subsequent practice and subsequent agreements contribute, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty.[960] These considerations are also relevant with regard to the practice of an international organization itself.

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[954] See Lauterpacht, "The development of the law of international organization ..." (footnote 779 above), at p. 460; N.M. Blokker, "Beyond 'Dili': on the powers and practice of international organizations", in *State, Sovereignty, and International Governance*, G. Kreijen, ed. (Oxford, Oxford University Press, 2002), pp. 299-322, at pp. 312-318.

[955] C. Brölmann, "Specialized rules of treaty interpretation: international organizations", in Hollis, *The Oxford Guide to Treaties* (see footnote 797 above), pp. 507-534, at pp. 520-521; S. Kadelbach, "The interpretation of the Charter", in *The Charter of the United Nations: A Commentary*, 3rd edition, B. Simma and others, eds. (Oxford, Oxford University Press, 2012), p. 71, at p. 80; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 127 and 281.

[956] Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 282; Schermers and Blokker, *International Institutional Law* (see footnote 933 above), p. 844; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford, Oxford University Press, 2012), p. 187; Klabbers, *An Introduction to Institutional Law* (see footnote 953 above), pp. 89-90; see also *Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares*, 22 November 2002, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 183-251, at p. 224, para. 145.

[957] The Commission may on second reading revisit the definition of "other subsequent practice" in draft conclusions 2 [1], para. 4, and 4, para. 3, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of parties; see Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), chap. IV, pp. 11-12.

[958] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961 (adopted by 60 votes to 16, with 23 abstentions, including the Soviet Union and other States of Eastern Europe) and resolution 1913 (XVIII) of 13 December 1963 (adopted by 91 votes with 2 against (Spain and Portugal)).

[959] The International Court of Justice used the expression "... purposes and functions as specified or implied in its constituent documents and developed in practice", *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 180.

[960] See para. (15) of the commentary to draft conclusion 1 and footnote 429 above; see also, in particular, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306-307, para. 67.

(34) The possible relevance of an international organization's "own practice" can thus be derived from articles 31, paragraph 1, and 32 of the 1969 Vienna Convention. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the object and purpose of the treaty, including the function of the international organization concerned, under article 31, paragraph 1.[961]

(35) Thus, article 5 of the 1969 Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way that takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character.[962] Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time.[963]

(36) Paragraph 3, like paragraph 2, refers to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization. The practice of an international organization in question can arise from the conduct of an organ, but can also be generated by the conduct of two or more organs.[964] It is understood that the practice of an international organization can only be relevant for the interpretation of its constituent instrument if that organization is competent, since it is a general requirement that international organizations do not act *ultra vires*.[965]

(37) Paragraph 3 of draft conclusion 12 [11] builds on draft conclusion 5, which addresses "subsequent practice" by parties to a treaty in the application of that treaty, as defined in draft conclusion 4. Draft conclusion 5 does not imply that the practice of an

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[961] See *South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955, I.C.J. Reports 1955*, p. 67, Separate Opinion of Judge Lauterpacht, at p. 106 ("… [a] proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization").

[962] Commentators are debating whether the specific institutional character of certain international organizations, in combination with the principles and values that are enshrined in their constituent instruments could also yield a "constitutional" interpretation of such instruments that receives inspiration from national constitutional law, see, for example, J.E. Alvarez, "Constitutional interpretation in international organizations", in *The Legitimacy of International Organizations* J.-M. Coicaud and V. Heiskanen, eds. (Tokyo, United Nations University Press, 2001), pp. 104-154;. A. Peters, "L'acte constitutif de l'organisation internationale", in E. Lagrange and J.-M. Sorel, eds., *Droit des organisations internationales* (Paris, LGDJ, 2013), pp. 216-218; M. Wood, "'Constitutionalization' of International Law: A Sceptical Voice", in *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick*, K.H. Kaikobad and M. Bohlinder, eds. (Leiden/Boston, Brill/Nijhoff, 2009), pp. 85-97.

[963] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53; see also draft conclusion 8 [3] and commentary thereto, paras. (24)-(30); Dörr, "Article 31 …" (see footnote 439 above), p. 537, para. 31; Schmalenbach, "Art. 5" (footnote 901 above), p. 92, para. 7.

[964] See Dörr (footnote 439 above), para. 21.

[965] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168 ("[b]ut when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization").

international organization, as such, in the application of its constituent instrument cannot be relevant practice under articles 31 and 32.[966]

Paragraph 4 — without prejudice to the "rules of the organization"

(38) Paragraph 4 of draft conclusion 12 [11] reflects article 5 of the Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied "without prejudice to any relevant rules of the organization". The term "rules of the organization" is to be understood in the same way as in article 2, paragraph 1 (j), of the 1986 Vienna Convention, as well as in article 2 (b) of the articles on responsibility of international organizations of 2011.

(39) The Commission has stated in its general commentary to the 2011 draft articles on the responsibility of international organizations:

> "There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound."[967]

(40) Paragraph 4 implies, *inter alia*, that more specific "relevant rules" of interpretation that may be contained in a constituent instrument of an international organization may take precedence over the general rules of interpretation under the 1969 Vienna Convention.[968] If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement after the conclusion of the treaty, do not wish to circumvent such a procedure by reaching a subsequent agreement under article 31, paragraph 3 (a). The special procedure under the treaty and a subsequent agreement under article 31, paragraph 3 (a), may, however, be compatible if they "serve different functions and have different legal effects".[969] Few constituent instruments contain explicit procedural or substantive rules regarding their interpretation.[970] Specific "relevant rules" of interpretation need not be formulated explicitly in the constituent instrument; they may also be implied therein, or derive from the "established practice of the organization".[971] The

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[966] See above commentary to draft conclusion 5, para. (14). The Commission may, however, eventually revisit the formulation of draft conclusion 5 in the light of draft conclusion 12 [11] in order to clarify their relationship. See also footnote 957 above.

[967] Draft articles on the responsibility of international organizations, general commentary, para. (7) (report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, p. 70, para. 88).

[968] See, for example, Klabbers, *An Introduction to Institutional Law* (footnote 953 above), p. 88; Schmalenbach, "Art. 5" (footnote 901 above), p. 89, para. 1, and p. 96, para. 15; Brölmann, "Specialized rules of treaty interpretation …" (footnote 955 above), p. 522; Dörr, "Article 31 …" (see footnote 439 above), p. 538, para. 32.

[969] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, paras. 252-257.

[970] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate specific rules "on" interpretation itself, see C. Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin/Heidelberg, Springer, 2007), pp. 26-27; Dörr, "Article 31 …" (see footnote 439 above), p. 537, para. 32.

[971] See 1986 Vienna Convention, art. 2 (j); and the International Law Commission's draft articles on the responsibility of international organizations, art. 2 (b), report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No.*

"established practice of the organisation" is a term that is narrower in scope than the term "practice of the organization" as such.

(41) The Commission has noted in its commentary to article 2 (j) of the 1986 Vienna Convention that the significance of a particular practice of an organization may depend on the specific rules and characteristics of the respective organization, as expressed in its constituent instrument:

> "It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect."[972]

(42) In this sense, the "established practice of the organization" may also be a means for the interpretation of constituent instruments of international organizations. Article 2, paragraph 1 (j), of the 1986 Vienna Convention and article 2 (b) of the draft articles on the responsibility of international organizations[973] recognize the "established practice of the organization" as a "rule of the organization". Such practice may produce different legal effects in different organizations and it is not always clear whether those effects should be explained primarily in terms of traditional sources of international law (treaty or custom) or of institutional law.[974] But even if it is difficult to make general statements, the "established practice of the organization" usually encompasses a specific form of practice,[975] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[976]

Conclusion 13 [12]
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

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10 (A/66/10), chap. V, sect. E, para. 87; C. Peters, "Subsequent practice and established practice of international organizations", *Göttingen Journal of International Law*, vol. 3 (2011), pp. 617-642.

[972] *Yearbook ... 1982*, vol. II (Part Two), chap. II, p. 21, commentary to draft article 2, para. 1 (j), para. (25).

[973] Report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, p. 52.

[974] See Higgins, "The Development of international law ..." (footnote 927 above), at p. 121 ("... aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, "Subsequent practice ..." (footnote 971 above), at pp. 630-631 ("... should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "there would have been problems in referring to the 'internal' law of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", *Yearbook ... 1982*, vol. II (Part Two), chap. II, p. 21, commentary to draft article 2, para. 1 (i), para. (25); Schermers and Blokker, *International Institutional Law* (see footnote 933 above), at p. 766; but see C. Ahlborn, "The rules of international organizations and the law of international responsibility", *International Organizations Law Review*, vol. 8 (2011), pp. 397-482, at pp. 424-428.

[975] Blokker, "Beyond 'Dili' ..." (see footnote 954 above), p. 312.

[976] Lauterpacht, "The development of the law of international organization ..." (footnote 779 above), p. 464 ("... consent of the general body of membership"); Higgins, "The Development of international law ..." (footnote 927 above), p. 121 ("[t]he degree of length and acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, "Subsequent practice and established practice ..." (footnote 971 above), pp. 633-641.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

Commentary

Paragraph 1 — definition of the term "expert treaty body"

(1) Some treaties establish bodies, consisting of experts who serve in their personal capacity, which have the task of monitoring or contributing in other ways to the application of those treaties. Examples of such expert treaty bodies are the committees established under various human rights treaties at the universal level,[977] for example, the Committee on the Elimination of Racial Discrimination,[978] the Human Rights Committee,[979] the Committee on the Elimination of All Forms of Discrimination against Women,[980] Committee on the Rights of Persons with Disabilities,[981] the Committee on the Rights of the Child[982] and the Committee against Torture.[983] Other expert treaty bodies include the Commission on the Limits of the Continental Shelf under the United Nations Convention on the Law of the Sea,[984] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),[985] and the International Narcotics Control Board under the Single Convention on Narcotic Drugs.[986]

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[977] See Nigel Rodley, "The role and impact of treaty bodies", in *The Oxford Handbook of International Human Rights Law*, D. Shelton, ed. (Oxford, Oxford University Press, 2013), pp. 621-641, at pp. 622-623.

[978] Arts. 8-14 of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195.

[979] Arts. 28-45 of the International Covenant on Civil and Political Rights (New York, 19 December 1966), *ibid.*, vol. 999, No. 14668, p. 171.

[980] Arts. 17-22 of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), *ibid.*, vol. 1249, No. 20378, p. 13.

[981] Arts. 34-39 of the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), *ibid.*, vol. 2515, No. 44910, p. 3.

[982] Arts. 43-45 of the Convention on the Rights of the Child (New York, 20 November 1989), *ibid.*, vol. 1577, No. 27531, p. 3.

[983] Arts. 17-24 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85.

[984] The Commission on the Limits of the Continental Shelf was established under art. 76, para. 8, of the United Nations Convention on the Law of the Sea and annex II to the Convention (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[985] The Compliance Committee under the Aarhus Convention was established under art. 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998), *ibid.*, vol. 2161, No. 37770,

(2) Paragraph 1 defines the term "expert treaty body" only "for the purposes of these draft conclusions". The draft conclusion does not claim otherwise to pronounce on the status of such bodies and the possible legal effect of their acts for other purposes.

(3) The term "serving in their personal capacity" means that the members of an expert treaty body are free from governmental instructions when they act in that capacity.[987] Draft conclusion 13 [12] is not concerned with bodies that consist of State representatives. The output of a body that is composed of State representatives, and that is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework.[988]

(4) Draft conclusion 13 [12] also does not apply in similar terms to bodies that are organs of an international organization.[989] The output of a body that is an organ of an international organization is, in the first place, attributed to the organization.[990] The exclusion of bodies that are organs of international organizations from the scope of draft conclusion 13 [12] has been made for formal reasons, since the present draft conclusions are not focused on the relevance of the rules of interpretation of the Vienna Convention. This does not exclude that the substance of the present draft conclusion may apply, *mutatis mutandis*, to pronouncements of independent expert bodies that are organs of international organizations.

(5) The expression "established under a treaty" means that the establishment or a competence of a particular expert body is provided under a treaty. In most cases it is clear whether these conditions are satisfied, but there may also be borderline cases. The Committee on Economic, Social and Cultural Rights, for example, is a body that was established by a resolution of an international organization,[991] but which was later given the competence to "consider" certain "communications" by the Optional Protocol to the

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p. 447, and decision I/7 on review of compliance, adopted at the first meeting of the parties in 2002 (ECE/MP.PP/2/Add.8).

[986] The International Narcotics Control Board was established under art. 5 of the Single Convention on Narcotic Drugs (New York, 30 March 1961), United Nations, *Treaty Series*, vol. 520, No. 7515, p. 151.

[987] See, e.g., art. 28, para. 3, of the International Covenant on Civil and Political Rights; see also Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edition (Oxford, Oxford University Press, 2014), p. 219.

[988] This is true, in particular, for decisions of Conferences of States Parties, see draft conclusion 12 [11].

[989] The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) is an important example of an expert body that is an organ of an international organization. It was established in 1926 to examine government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of ILO for three-year terms, see www.ilo.org and information provided by ILO to the Commission, which is available on the International Law Commission website at http://legal.un.org/ilc/guide/1_11.shtml.

[990] Art. 6, para. 1, of the articles on responsibility of international organizations, General Assembly resolution 66/100, annex, of 9 December 2011 (for the commentary thereto, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, sect. E); the Working Group on Arbitrary Detention is an example of a body of experts serving in their personal capacity that is mandated by the Human Rights Council under its resolution 24/7 of 26 September 2013, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 53* (A/68/53/Add.1). Being a subsidiary organ of the Council, it is not an expert treaty body under draft conclusion 13 [12], see www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

[991] Economic and Social Council, resolution 1987/5 of 26 May 1987 (E/C.12/1989/4), para. 9.

International Covenant on Economic, Social and Cultural Rights.[992] Such a body is an expert treaty body within the meaning of draft conclusion 13 [12] as a treaty provides for the exercise of certain competences by the Committee. Another borderline case is the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the establishment of which — by a decision of the Conference of the Parties — is implicitly envisaged in article 18 of the Protocol.[993]

Paragraph 2 — primacy of the rules of the treaty

(6) Treaties use various terms for designating the forms of action of expert treaty bodies, for example, "views",[994] "recommendations",[995] "comments",[996] "measures"[997] and "consequences".[998] Draft conclusion 13 [12] employs, for the purpose of the present draft conclusion, the general term "pronouncements".[999] This term covers all relevant forms of action by expert treaty bodies. Other general terms that are in use for certain bodies include "jurisprudence"[1000] and "output".[1001]

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[992] Arts. 1-15 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, annexed to General Assembly resolution 63/117 of 10 December 2008.

[993] The Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997) (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162) was established under art. 18 of the Protocol and decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol, adopted by the Conference of the Parties at its seventh session (FCCC/CP/2001/13/Add.3).

[994] See International Covenant on Civil and Political Rights, art. 42, para. 7 (c); Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 4; and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9, para. 1.

[995] See International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child (New York, 29 November 1989) (United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3), art. 45 (d); International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006) (*ibid.*, vol. 2716, No. 48088, p. 3), art. 33, para. 5; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (*ibid.*, vol. 1833, No. 31363, p. 3), art. 76, para. 8.

[996] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; International Covenant on Civil and Political Rights, art. 40, para. 4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), art. 74.

[997] Decision I/7 on review of compliance (see footnote 985 above), sect. XI, para. 36, and sect. XII, para. 37; Single Convention on Narcotic Drugs, art. 14.

[998] Decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol (see footnote 993 above), annex, sect. XV.

[999] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. III, para. 26 (b); see also the "Final report on the impact of findings of the United Nations human rights treaty bodies", International Law Association, *Report of the Seventy-first Conference* (see footnote 540 above) p. 5, para. 15; European Commission for Democracy through Law (Venice Commission), "Report on the implementation of international human rights treaties in domestic law and the role of courts" (CDL-AD(2014)036), adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014), p. 31, para. 78.

[1000] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66; Rodley, "The role and impact of treaty bodies" (footnote 977 above), p. 640; *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*, 2nd edition, A. Andrusevych, T. Alge and C. Konrad, eds. (Lviv, Resource and Analysis Center "Society and Environment", 2011); "Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date", available from

(7) Paragraph 2 serves to emphasize that any possible legal effect of a pronouncement by an expert treaty body depends, first and foremost, on the specific rules of the applicable treaty itself. Such possible legal effects may therefore be very different. They must be determined by way of applying the rules on treaty interpretation set forth in the Vienna Convention. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement, or its context, usually gives a clear indication that such pronouncements are not legally binding.[1002] This is true, for example, for the terms "views" (article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights), "suggestions and recommendations" (article 14, paragraph 8, of the International Convention on the Elimination of All Forms of Racial Discrimination) and "recommendations" (article 76, paragraph 8, of the United Nations Convention on the Law of the Sea).

(8) It is not necessary, for present purposes, to describe the competences of different expert treaty bodies in detail. Pronouncements of expert treaty bodies under human rights treaties, for example, are usually either adopted in reaction to State reports (for example, "concluding observations"), or in response to individual communications (for example, "views"), or regarding the implementation or interpretation of the respective treaties generally (for example, "general comments").[1003] Whereas such pronouncements are governed by different specific provisions of the treaty that primarily determine their legal effect, they often, explicitly or implicitly, interpret the treaty in a way that raises some general issues that draft conclusion 13 [12] seeks to address.[1004]

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www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf (accessed 8 July 2016).

[1001] R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", in *UN Human Rights Treaty Bodies: Law and Legitimacy*, H. Keller and L. Grover, eds. (Cambridge, United Kingdom, Cambridge University Press, 2012), pp. 356-413, at p. 402; Rodley, "The role and impact of treaty bodies" (see footnote 977 above), p. 639; K. Mechlem, "Treaty bodies and the interpretation of human rights", *Vanderbilt Journal of Transnational Law*, vol. 42 (2009), pp. 905-947, at p. 908.

[1002] This is generally accepted in the literature, see International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), p. 5, para. 18; Rodley, "The role and impact of treaty bodies" (see footnote 977 above), p. 639; Tomuschat, *Human Rights* ... (footnote 987 above), pp. 233 and 267; D. Shelton, "The legal status of normative pronouncements of human rights treaty bodies" in *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum*, vol. I, H.P. Hestermeyer and others, eds. (Leiden; Boston, Martinus Nijhoff Publishers, 2012), pp. 553-575, at p. 559; H. Keller and L. Grover, "General comments of the Human Rights Committee and their legitimacy", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (see footnote 1001 above), pp. 116-198, at p. 129; Venice Commission, "Report on the implementation of international human rights treaties … (footnote 999 above), p. 30, para. 76; for the term "determine" in art. 18 of the Kyoto Protocol and decision 24/CP.7, see G. Ulfstein and J. Werksmann, "The Kyoto compliance system: towards hard enforcement", in *Implementing the Climate Regime: International Compliance*, O.S. Stokke, J. Hovi and G. Ulfstein, eds. (London, Fridtjof Nansen Institut, 2005), pp. 39-62, at pp. 55-56.

[1003] W. Kälin, "Examination of state reports", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (see footnote 1001 above), pp. 16-72; G. Ulfstein, "Individual complaints", *ibid.*, pp. 73-115; Mechlem, "Treaty bodies … (see footnote 1001 above), pp. 922-930; the legal basis for general comments under the International Covenant on Civil and Political Rights is art. 40, para. 4, but this practice has been generally accepted also with regard to other expert bodies under human rights treaties, see Keller and Grover, "General comments …" (footnote 1002 above), pp. 127-128.

[1004] For example, Rodley, "The role and impact of treaty bodies" (see footnote 977 above), p. 639; Shelton, "The legal status of normative pronouncements …" (see footnote 1002 above), pp. 574-

Paragraph 3, first sentence — "may give rise to, or refer to, a subsequent agreement or a subsequent practice"

(9) A pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3 (b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty. This has been confirmed, for example, by the reaction to a draft proposition of the Human Rights Committee according to which its own "general body of jurisprudence", or the acquiescence by States to that jurisprudence, would constitute subsequent practice under article 31, paragraph 3 (b). The proposition of the Human Rights Committee was:

> "In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the sense of article 31(3)(b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice."[1005]

(10) When this proposition was criticized by some States,[1006] the Committee did not pursue its proposal and adopted its general comment No. 33 without a reference to article 31, paragraph 3 (b).[1007] This confirms that pronouncements of expert treaty bodies cannot as such constitute subsequent practice under article 31, paragraph 3 (b).

(11) Pronouncements of expert treaty bodies may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice by the parties which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (a) or (b). This possibility has been recognized by States,[1008] by the Commission[1009] and also by the International Law Association[1010] and by a significant number of authors.[1011] There is indeed no reason why a subsequent agreement between the parties or subsequent practice

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575; A. Boyle and C. Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007), p. 155.

[1005] Draft general comment No. 33 (The obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights) (Second revised version as of 18 August 2008) (CCPR/C/GC/33/CRP.3), 25 August 2008, at para. 17; this position has also been put forward by several authors, see Keller and Grover, "General comments …" (footnote 1002 above), pp. 130-132 with further references.

[1006] See, for example, the "Comments of the United States of America on the Human Rights Committee's 'Draft general comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant Civil and Political Rights'", 17 October 2008, para. 17. Available from www.state.gov/documents/organization/138851.pdf (accessed 8 July 2016).

[1007] Report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40* (A/64/40), vol. I, annex V.

[1008] See, for example, *Official Records of the General Assembly, Seventieth Session, Sixth Committee*, Summary Record of the 22nd meeting (A/C.6/70/SR.22), 6 November 2015, para. 46 (United States: "… States Parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute subsequent practice (of those States) for the purposes of art. 31, paragraph 3").

[1009] See para. (11) of the commentary to draft conclusion 3 [2].

[1010] See International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), p. 6, para. 21.

[1011] See, for example, Mechlem, "Treaty bodies … (footnote 1001 above), pp. 920-921; B. Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", in Keller and Grover, *UN Human Rights Treaty Bodies* … (footnote 1001 above), pp. 289-290; Ulfstein and Werksmann, "The Kyoto compliance system …" (footnote 1002 above), p. 96.

that establishes the agreement of the parties themselves regarding the interpretation of a treaty could not arise from, or be referred to by, a pronouncement of an expert treaty body.

(12) Whereas a pronouncement of an expert treaty body can, in principle, give rise to a subsequent agreement or a subsequent practice by the parties themselves under article 31, paragraph 3 (a) and (b), this result is not easily achieved in practice. Most treaties that establish expert treaty bodies at the universal level have many parties. It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty.

(13) One possible way of identifying an agreement of the parties regarding the interpretation of a treaty that is reflected in a pronouncement of an expert treaty body is to look at resolutions of organs of international organizations as well as of Conferences of States Parties. General Assembly resolutions may, in particular, explicitly or implicitly refer to pronouncements of expert treaty bodies. This is true, for example, for two resolutions of the General Assembly on the "protection of human rights and fundamental freedoms while countering terrorism",[1012] which expressly refer to general comment No. 29 (2001) of the Human Rights Committee on derogations from provisions of the Covenant during a state of emergency.[1013] Both resolutions reaffirm the obligation of States to respect certain rights under the International Covenant on Civil and Political Rights as non-derogable in any circumstances and underline the "exceptional and temporary nature" of derogations by way of using the terms used in general comment No. 29 when interpreting and thereby specifying the obligation of States under article 4 of the Covenant.[1014] These resolutions were adopted without a vote by the General Assembly, and hence would reflect a subsequent agreement under article 31, paragraph 3 (a) or (b), if the consensus constituted the acceptance by all the parties of the interpretation that is contained in the pronouncement.[1015]

(14) The pronouncement of the Committee on Economic, Social and Cultural Rights, in its general comment No. 15 (2002), according to which articles 11 and 12 of that Covenant imply a human right to water,[1016] offers another illustration of the way in which an agreement of the parties may come about. After a debate over a number of years, the General Assembly on 17 December 2015 adopted a resolution, without a vote, that defines the human right to safe drinking water by using the language that the Committee employed in its general comment No. 15 in order to interpret the right.[1017] That resolution may refer to an agreement under article 31, paragraph 3 (a) or (b), depending on whether the consensus

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[1012] General Assembly resolutions 65/221 of 21 December 2010, para. 5, footnote 8, and 68/178 of 18 December 2013, para. 5, footnote 8.

[1013] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40), vol. I, Annex VI.

[1014] *Ibid.*, para. 2.

[1015] See draft conclusion 11 [10], para. 3, and the commentary thereto.

[1016] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), *Official Records of the Economic and Social Council 2003, Supplement No. 2* (E/2003/22-E/C.12/2002/13), annex IV, para. 2. ("The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses").

[1017] General Assembly resolution 70/169 of 17 December 2015 recalls general comment No. 15 of the Committee on Economic, Social and Cultural Rights on the right to water (see footnote 1016 above) and uses the same language: "Recognizes that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use" (para. 2).

constituted the acceptance by all parties of the interpretation that is contained in the pronouncement.[1018]

(15) Other General Assembly resolutions explicitly refer to pronouncements of expert treaty bodies[1019] or call upon States to take into account the recommendations, observations and general comments of relevant treaty bodies to the topic on the implementation of the related treaties.[1020] Resolutions of Conferences of States Parties may do the same, as with regard to recommendations of the Compliance Committee under the Aarhus Convention.[1021] Such resolutions should, however, be approached with caution before reaching any conclusion as to whether they imply a subsequent agreement or subsequent practice of the parties under article 31, paragraph 3 (a) or (b).

(16) Even if a pronouncement of an expert treaty body does not give rise to, or refer to, a subsequent agreement or a subsequent practice that establishes the agreement of all parties to a treaty, it may be relevant for the identification of other subsequent practice under article 32 that does not establish such agreement. There are, for example, resolutions of the Human Rights Council that refer to general comments of the Human Rights Committee or of the Committee on Economic, Social, and Cultural Rights.[1022] Even if the membership of the Council is limited, such resolutions may be relevant for the interpretation of a treaty as expressing other subsequent practice under article 32. Another example concerns the International Narcotics Control Board.[1023] A number of States have engaged in subsequent practice under article 32 by disagreeing with the proposals of the Board regarding the establishment of so-called safe injection rooms and other harm reduction measures,[1024]

[1018] See draft conclusion 11 [10], para. 3, and the commentary thereto, paras. (31)-(38); in the case of resolution 70/169 on the right to water (see footnote 1017 above) "… the United States dissociated itself from the consensus on paragraph 2 on the grounds that the language used to define the right to water and sanitation was based on the views of the Committee on Economic, Social and Cultural Rights and the Special Rapporteur only and did not appear in any international agreement or reflect any international consensus" (see *Official Records of the General Assembly, Seventieth Session, Third Committee, 55th meeting* (A/C.3/70/SR.55), 24 November 2015, para. 144). It is not entirely clear whether the United States thereby wished to merely restate its position that the resolution did not recognize a particular effect of the pronouncement of the Committee, as such, or whether it disagreed with the definition in substance.

[1019] See General Assembly resolution 69/166 of 18 December 2014, adopted without a vote, recalling general comment No. 16 of the Human Rights Committee on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (*Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI).

[1020] See General Assembly resolution 69/157 of 18 December 2014, adopted without a vote; and resolution 68/147 of 18 December 2013, adopted without a vote.

[1021] Decision I/7 on review of compliance (see footnote 985 above), annex, sects. III and XII, para. 37; V. Koester, "The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)", in *Making Treaties Work, Human Rights, Environment and Arms Control*, G. Ulfstein and others, eds. (Cambridge, United Kingdom, Cambridge University Press, 2007), pp. 179-217, at p. 203.

[1022] See Human Rights Council resolutions 28/16 of 26 March 2015 and 28/19 of 27 March 2015, adopted without a vote (report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53* (A/70/53)).

[1023] See footnote 986 above.

[1024] See *Report of the International Narcotics Control Board for 2009* (E/INCB/2009/1, United Nations Publication, Sales No. E.10.XI.1), para. 278; see also J. Csete and D. Wolfe, "Closed to reason: the International Narcotics Control Board and HIV/AIDS" (Canadian HIV/AIDS Legal Network/International Harm Reduction Development of the Open Society Institute, 2007), pp. 12-18.

criticizing the Board for following too rigid an interpretation of the drug conventions and as acting beyond its mandate.[1025]

(17) Paragraph 3, first sentence, circumscribes the ways in which a pronouncement by an expert treaty body may be relevant for subsequent agreements and subsequent practice of parties to a treaty by using the terms "may give rise to" and "or refer to". The expression "may give rise to" addresses situations in which a pronouncement comes first and the practice and the possible agreement of the parties occur thereafter. In this situation, the pronouncement may serve as a catalyst for the subsequent practice of States parties. The term "refer to", on the other hand, covers situations in which the subsequent practice and a possible agreement of the parties have developed before the pronouncement, and where the pronouncement is only an indication of such an agreement or practice. Paragraph 3 uses the term "refer to" rather than "reflect" in order to make clear that any subsequent practice or agreement of the parties is not comprised in the pronouncement itself. This term does not, however, require that the pronouncement refer to such subsequent practice or agreement explicitly.[1026]

Paragraph 3, second sentence — presumption against silence as constituting acceptance

(18) An agreement of all the parties to a treaty, or even only a large part of them, regarding the interpretation that is articulated in a pronouncement is often only conceivable if the absence of objections could be taken as agreement by State parties that have remained silent. Draft conclusion 10 [9], paragraph 2, provides, as a general rule: "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[1027] Paragraph 3, second sentence, does not purport to recognize an exception to this general rule, but rather intends to specify and apply this rule to the typical cases of pronouncements of expert bodies.

(19) This means, in particular, that it cannot usually be expected that States parties take a position with respect to every pronouncement by an expert treaty body, be it addressed to another State or to all States generally.[1028] On the other hand, State parties may have an obligation, under a duty to cooperate under certain treaties, to take into account and to react

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[1025] D. Barrett, *Unique in International Relations? A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies* (London, International Harm Reduction Association, 2008), p. 8.

[1026] Expert treaty bodies under human rights treaties have rarely attempted to specifically identify the practice of the parties for the purpose of interpreting a particular treaty provision, see examples in G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: second report for the ILC Study Group on treaties over time", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210-278; Schlütter, "Aspects of human rights interpretation ..." (see footnote 1011 above), p. 318.

[1027] See draft conclusion 10 [9], para. 2.

[1028] See Ulfstein and Werksmann, "The Kyoto compliance system ..." (footnote 1002 above), p. 97; Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies ..." (footnote 1001 above), p. 410.

to a pronouncement of an expert treaty body that is specifically addressed to them,[1029] or to individual communications regarding their own conduct.[1030]

Paragraph 4 — without prejudice to other contribution

(20) Apart from possibly giving rise to, or referring to, subsequent agreements or subsequent practice of the parties themselves under articles 31, paragraph 3 (a) and (b), and 32, pronouncements by expert treaty bodies may also otherwise contribute to, and thus be relevant for, the interpretation of a treaty. Paragraph 4 addresses this possibility by way of a without prejudice clause. The term "otherwise" is, however, not used because the Commission attaches less importance to contributions by expert treaty bodies to the interpretation of a treaty other than those that are described in paragraph 3.

(21) The International Court of Justice has confirmed, in particular in the *Ahmadou Sadio Diallo* case, that pronouncements of the Human Rights Committee are relevant for the purpose of the interpreting of the International Covenant on Civil and Political Rights, irrespective of whether such pronouncements give rise to, or refer to, an agreement of the parties under article 31, paragraph 3:

> "Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of 'General Comments'.
>
> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[1031]

(22) Regional human rights courts have also used pronouncements of expert treaty bodies as an aid for the interpretation of treaties that they are called on to apply.[1032] Many domestic

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[1029] Such as a pronouncement regarding the permissibility of a reservation that it has formulated, see guideline 3.2.3 of the guide to practice on reservations to treaties, and para. (3) of the commentary thereto, adopted by the Commission in 2011, report of the International Law Commission, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1).

[1030] C. Tomuschat, "Human Rights Committee", in *The Max Planck Encyclopedia of Public International Law* (www.mpepil.com), at para. 14 ("States parties cannot simply ignore them [individual communications], but have to consider them in good faith (*bona fide*) … not to react at all … would appear to amount to a violation …").

[1031] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66; see also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 179-181, paras. 109-110 and 112, and at pp. 192-193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 101, referring to pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[1032] The Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos and Others) v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 August 2013, Series C No. 268, paras. 189 and 191; African Commission on courts consider that pronouncements of expert treaty bodies under human rights treaties, while not being legally binding on them as such,[1033] nevertheless "deserve to be given considerable weight in determining the meaning of a relevant right and the determination of a violation".[1034]

(23) The Commission itself, in its commentary to the Guide to Practice on Reservations to Treaties,[1035] addressed the question of the relevance of pronouncements of expert treaty bodies under human rights treaties with respect to reservations.[1036]

(24) Court decisions have not always fully explained the relevance of pronouncements by expert treaty bodies for the purpose of the interpretation of a treaty, be it in terms of the rules of interpretation under the Vienna Convention or otherwise.[1037] The Commission has considered the following alternatives (paragraphs (25) and (26) below).

(25) Some members consider that pronouncements of expert treaty bodies are a form of practice that may contribute to the interpretation of a treaty, relying, *inter alia*, on the

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Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, Decisions on communications brought before the African Commission, twenty-ninth ordinary session, Tripoli, May 2001 at para. 24 ("In interpreting and applying the Charter, the Commission … is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by UN treaty bodies"); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decisions on communications brought before the African Commission, thirtieth ordinary session, Banjul, October 2001 at para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights in its General Comment No. 7"); *Marguš v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48-50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107-108, 147-151, 155 and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70-72; see also International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), pp. 29-38, paras. 116-155.

[1033] See the decisions quoted in Venice Commission, "Report on the implementation of international human rights treaties …" (footnote 999 above), at para. 76, footnotes 172 and 173 (Ireland, Supreme Court, *Kavanagh (Joseph) v. the Governor of Mountjoy Prison and the Attorney General* [2002] IESC 13 (1 March 2002), para. 36; France, Council of State, *Hauchemaille v. France*, case No. 238849, 11 October 2001, ILDC 767 (FR 2001), para. 22).

[1034] International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), p. 43, para. 175; Germany, Federal Administrative Court, BVerwGE, vol. 134, p. 1, at p. 22, para. 48.

[1035] Report of the International Law Commission (2011), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1).

[1036] "Of course, if such bodies have been vested with decision-making power the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts. In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers. Consequently, their conclusions are not legally binding, and States parties are obliged only to 'take account' of their assessments in good faith"(*ibid.*, para. (3) of the commentary to guideline 3.2.3).

[1037] International Law Association, *Report of the Seventy-first Conference* (see footnote 540 above), p. 5, para. 17; Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies …" (footnote 1001 above), p. 401; one of the few judgments in which this was the case is High Court of Osaka, Judgment of 28 October 1994, 1513 *Hanrei Jiho* 71, 87, 38 (as quoted in the *Report of the Seventy-first Conference* of the International Law Association (see footnote 540 above), at para. 20, footnote 22), also available in *Japanese Annual of International Law*, vol. 38 (1995), pp. 109-150, at pp. 118-133; and Germany, Federal Administrative Court (see footnote 1034 above).

Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the International Court of Justice referred to the "constant practice of the Human Rights Committee" in order to support its own interpretation of a provision of the International Covenant on Civil and Political Rights.[1038] Those members consider that international and domestic courts mostly use pronouncements of expert treaty bodies in the discretionary way in which article 32 describes supplementary means of interpretation.[1039] In addition, pronouncements of expert treaty bodies could, as practice under the treaty, also "contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty".[1040] These members consider also that draft conclusion 12 [11], paragraph 3, could help to resolve the question,[1041] as the practice of both an international organization in the application of its own instrument and a pronouncement of an expert treaty body have in common that, while they are both not practice of a party to the treaty, they are nevertheless conduct mandated by the treaty the purpose of which is to contribute to the treaty's proper application.

(26) Other members consider that pronouncements of expert treaty bodies are not, as such, a form of practice in the sense of the present topic. It was pointed out that draft conclusion 4, paragraph 3, provides that "other subsequent practice consists of conduct by

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[1038] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[1039] The High Court of Osaka has explicitly stated: "One may consider that the 'general comments' and 'views'... should be relied upon as supplementary means of interpretation of the ICCPR." Osaka High Court, Judgment of 28 October 1994 (footnote 1037 above), as quoted in the *Report of the Seventy-first Conference* of the International Law Association (see footnote 540 above), at para. 85, footnote 178, also available in *Japanese Annual of International Law*, vol. 38 (1995), at pp. 129-130; see also, for example, Netherlands, Central Appeals Tribunal, *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank* (available from http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2006:AY5560, accessed 11 July 2016); United Kingdom, on the one hand, House of Lords, *Jones v. Saudi Arabia*, 14 June 2006 [2006] UKHL 26 ("no value") and, on the other hand, House of Lords, *A. v. Secretary of State for the Home Department* [2005] UKHL 71, paras. 34-36(relying on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture) and Court of Appeal, *R. (on the application of Al-Skeini) v. Secretary of State for Defence, application for judicial review* (2005) EWCA Civ 1609 (2006) HRLR 7, at para. 101 (citing general comment No. 31 of the Human Rights Committee to establish the extraterritorial application of the Human Rights Act 1998); South Africa, on the one hand, High Court Witwatersrand, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002 (6) BCLR, p. 625, at p. 629 ("general comments have an authoritative status under international law"), as quoted at para. 11 the *Report of the Seventy-first Conference* of the International Law Association (footnote 540 above) and, on the other hand, Constitutional Court, *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* (CCT 8/02) [2002] ZACC 15, paras. 26 and 37 (rejecting [application of] the "minimum-core standard" set out by the Committee on Economic, Social and Cultural Rights in general comment No. 3 (*Official Records of the Economic and Social Council, 1991, Supplement No. 3* (E/1991/23-E/C.12/1990/8 and Corr.1), annex III, p. 83); Japan, Tokyo District Court, Judgment of 15 March 2001, 1784 *Hanrei Jiho* 67, at 74 ("the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan"), as quoted at para. 87 of the *Report of the Seventy-first Conference* of the International Law Association (footnote 540 above).

[1040] See para. (15) of the commentary to draft conclusion 2 [1], footnote 429; see also draft conclusion 12 [11], para. 3.

[1041] See draft conclusion 12 [11], para. 3.

one or more parties in the application of the treaty, after its conclusion",[1042] and that the topic was therefore restricted to practice by the parties themselves. It was also suggested that pronouncements of expert treaty bodies could not simultaneously be a form of application of the treaty and perform a monitoring function. According to those members, the *Diallo* judgment of the International Court of Justice suggested that the mandate and the function of expert treaty bodies, like that of courts, was to supervise the application of the treaty, not to serve themselves as a means of interpretation.[1043]

(27) Ultimately, the Commission decided to limit itself, for the time being, to formulating, in paragraph 4 of draft conclusion 13 [12], a without prejudice clause. The matter may be taken up again on second reading, in light of the views expressed by States.[1044]

[1042] Pronouncements of expert bodies are indeed "in the application of the treaty" since such "application", according to the Commission, "includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation" (see para. (18) of the commentary to draft conclusion 4).

[1043] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66.

[1044] In its commentary to draft conclusion 12 [11], paragraph 3, the Commission noted: "The Commission may … revisit the definition of 'other subsequent practice' in draft conclusions 2 [1], para. 4, and 4, para. 3, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of parties" (see footnote 957 above).

Chapter VII
Crimes against humanity

A. Introduction

77. At its sixty-sixth session (2014), the Commission decided to include the topic "Crimes against humanity" in its programme of work and appointed Mr. Sean D. Murphy as Special Rapporteur for the topic.[1045] The General Assembly, in paragraph 7 of its resolution 69/118 of 10 December 2014, subsequently took note of the decision of the Commission to include the topic in its programme of work.

78. At its sixty-seventh session (2015), the Commission considered the first report of the Special Rapporteur (A/CN.4/680) and provisionally adopted four draft articles and commentaries thereto.[1046] It also requested the Secretariat to prepare a memorandum providing information on existing treaty-based monitoring mechanisms that may be of relevance to its future work on the present topic.[1047]

B. Consideration of the topic at the present session

79. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/690), as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission (A/CN.4/698), which were considered at its 3296th to 3301st meetings, from 11 to 19 May 2016.[1048]

80. In his second report, the Special Rapporteur addressed criminalization under national law (chap. I); establishment of national jurisdiction (chap. II); general investigation and cooperation for identifying alleged offenders (chap. III); exercise of national jurisdiction when an alleged offender is present (chap. IV); *aut dedere aut judicare* (chap. V); fair treatment of an alleged offender (chap. VI); and the future programme of work on the topic (chap. VII). The Special Rapporteur proposed six draft articles corresponding to the issues addressed in chapters I to VI, respectively.[1049]

81. At its 3301st meeting, on 19 May 2016, the Commission referred draft articles 5, 6, 7, 8, 9 and 10, as contained in the Special Rapporteur's second report, to the Drafting Committee. It also requested the Drafting Committee to consider the question of the criminal responsibility of legal persons on the basis of a concept paper to be prepared by the Special Rapporteur.

[1045] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 266.

[1046] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 110-117.

[1047] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 115.

[1048] See the Provisional Summary Records of the 3296th to 3301st meetings (A/CN.4/SR.3296, A/CN.4/SR.3297, A/CN.4/SR.3298, A/CN.4/SR.3299, A/CN.4/SR.3300 and A/CN.4/SR.3301).

[1049] See the second report on crimes against humanity (A/CN.4/690): draft article 5 (Criminalization under national law); draft article 6 (Establishment of national jurisdiction); draft article 7 (General investigation and cooperation for identifying alleged offenders); draft article 8 (Exercise of national jurisdiction when an alleged offender is present); draft article 9 (*Aut dedere aut judicare*); and draft article 10 (Fair treatment of the alleged offender).

82. At its 3312th and 3325th meetings, on 9 June and 21 July 2016 respectively, the Commission considered two reports of the Drafting Committee and provisionally adopted draft articles 5 to 10 (see section C.1 below).

83. At its 3341st meeting, on 9 August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session (see section C.2 below).

C. Text of the draft articles on crimes against humanity provisionally adopted so far by the Commission

1. Text of the draft articles

84. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Article 1
Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2
General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3
Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4
Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.[1050]

Article 5
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

[1050] The placement of this paragraph will be addressed at a further stage.

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 6
Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 7
Investigation

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 8
Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 9
Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 10
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(*a*) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(*b*) to be visited by a representative of that State or those States; and

(*c*) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

85. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

Crimes against humanity

Article 5
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Commentary

(1) Draft article 5 sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude any superior orders defence or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such crimes. Measures of this kind are essential for the proper functioning of the subsequent draft articles relating to the establishment and exercise of jurisdiction over alleged offenders.

Ensuring that "crimes against humanity" are offences in national criminal law

(2) The International Military Tribunal at Nürnberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[1051] The Commission's 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."[1052] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provided in its preamble that "the effective punishment of … crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security".[1053] The preamble to the Rome Statute affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".[1054]

(3) Many States have adopted laws on crimes against humanity that provide for the prosecution of such crimes in their national system. The Rome Statute, in particular, has inspired the enactment or revision of a number of national laws on crimes against humanity that define such crimes in terms identical to or very similar to the offence as defined in article 7 of that Statute. At the same time, many States have adopted national laws that differ, sometimes significantly, from the definition set forth in article 7. Moreover, still other States have not adopted any national law on crimes against humanity. Those States typically do have national criminal laws that provide for punishment in some fashion of

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[1051] *Judgment of 30 September 1946, in Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945-1 October 1946)*, vol. 22 (1948), p. 466.

[1052] *Yearbook … 1950*, vol. II, document A/1316, Part III, p. 374, para. 97 (Principle 1).

[1053] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73. As of August 2016, this Convention had 55 parties.

[1054] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape.[1055] Yet those States have not criminalized crimes against humanity as such and this *lacuna* may preclude prosecution and punishment of the conduct, including in terms commensurate with the gravity of the offence.

(4) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) provides in article 4, paragraph 1, that: "Each State Party shall ensure that all acts of torture are offences under its criminal law."[1056] The Committee against Torture has stressed the importance of fulfilling such an obligation so as to avoid possible discrepancies between the crime as defined in the Convention and the crime as it is addressed in national law:

> "Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State."[1057]

(5) To help avoid such loopholes with respect to crimes against humanity, draft article 5, paragraph 1, provides that each State shall take the necessary measures to ensure that crimes against humanity, as such, constitute offences under its criminal law. Draft article 5, paragraphs 2 and 3 (discussed below), then further obligate the State to criminalize certain ways by which natural persons might engage in such crimes.

(6) Since the term "crimes against humanity" is defined in draft article 3, paragraphs 1 to 3, the obligation set forth in draft article 5, paragraph 1, requires that the crimes so defined are made offences under the State's national criminal laws. While there might be some deviations from the exact language of draft article 3, paragraphs 1 to 3, so as to take account of terminological or other issues specific to any given State, such deviations should not result in qualifications or alterations that significantly depart from the meaning of crimes against humanity as defined in draft article 3, paragraphs 1 to 3. The term "crimes against humanity" used in draft article 5 (and in subsequent draft articles), however, does not include the "without prejudice" clause contained in draft article 3, paragraph 4. While that clause recognizes the possibility of a broader definition of "crimes against humanity" in any international instrument or national law, for purposes of these draft articles the definition of "crimes against humanity" is limited to draft article 3, paragraphs 1 to 3.

(7) Like the Convention against Torture, many treaties in the areas of international humanitarian law, human rights and international criminal law require that a State party

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[1055] See *Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"*, Appeals Chamber, No. ICC-02/11-01/12 OA (27 May 2015) (finding that a national prosecution for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining State security was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution). Available from www.icc-cpi.int/CourtRecords/CR2015_06088.PDF (accessed 22 June 2016).

[1056] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85 (hereinafter, "Convention against Torture").

[1057] See Committee against Torture, General Comment No. 2 (2007), para. 9, in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI; see also Committee against Torture, *ibid., Fifty-eighth Session, Supplement No. 44* (A/58/44), chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Slovenia, para. 115 (a), and Belgium, para. 130.

ensure that the prohibited conduct is an "offence" or "punishable" under its national law, though the exact wording of the obligation varies.[1058] Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[1059] and the 1949 Geneva Conventions,[1060] contain an obligation to enact "legislation", but the Commission viewed it appropriate to model draft article 5, paragraph 1, on more recent treaties, such as the Convention against Torture.

Committing, attempting to commit, assisting in or contributing to a crime against humanity

(8) Draft article 5, paragraph 2, provides that each State shall take the necessary measures to ensure that certain ways by which natural persons might engage in crimes against humanity are criminalized under national law, specifically: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

[1058] See, for example: Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105, art. 2; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), *ibid.*, vol. 1035, No. 15410, p. 167, art. 2, para. 2; International Convention Against the Taking of Hostages (New York, 17 December 1979), *ibid.*, vol. 1316, No. 21931, p. 205, art. 2; Convention against Torture (see footnote 1056 above), at art. 4; Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), Organization of American States, *Treaty Series*, No. 67, art. 6; Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363, art. 9, para. 2; Inter-American Convention on Forced Disappearance of Persons (Belem do Para, 9 June 1994), Organization of American States, *Treaty Series*, No. 68, art. III; International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256, art. 4; International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), *ibid.*, vol. 2178, No. 38349, p. 197, art. 4; OAU [Organization of African Unity] Convention on the Prevention and Combating of Terrorism (Algiers, 14 July 1999), *ibid.*, vol. 2219, No. 39464, p. 179, art. 2 (a); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *ibid.*, vol. 2237, No. 39574, p. 319, art. 5, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid.*, vol. 2716, No. 48088, p. 3, art. 7, para. 1; Association of Southeast Asian Nations Convention on Counter Terrorism (Cebu, 13 January 2007), art. IX, para. 1, in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 336.

[1059] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277, art. V.

[1060] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), *ibid.*, vol. 75, No. 970, p. 31, art. 49 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85, art. 50 ("Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135, art. 129 ("Geneva Convention III"); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287, art. 146 ("Geneva Convention IV"). For the Commentary of 2016 on art. 49 (Penal sanctions) of Geneva Convention I (hereinafter, "2016 ICRC Commentary on art. 49"), see International Committee of the Red Cross (ICRC) at www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84.

(9) In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized "crimes against humanity" impose criminal responsibility upon a person who "commits" the offence (sometimes referred to in national law as "direct" commission, as "perpetration" of the act or as being a "principal" in the commission of the act). For example, the Nürnberg Charter provided jurisdiction for the International Military Tribunal over "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes".[1061] Likewise, the statutes of both the International Criminal Tribunal for the former Yugoslavia[1062] and the International Criminal Tribunal for Rwanda[1063] provide that a person who "committed" crimes against humanity "shall be individually responsible for the crime". The Rome Statute provides that: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment" and "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual [or] jointly with another".[1064] Similarly, the instruments regulating the Special Court for Sierra Leone,[1065] the Special Panels for Serious Crimes in East Timor,[1066] the Extraordinary Chambers in the Courts of Cambodia,[1067] the Supreme Iraqi Criminal Tribunal[1068] and the Extraordinary African

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[1061] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945), Charter of the International Military Tribunal, art. 6, United Nations, *Treaty Series*, vol. 82, No. 251, p. 279 (hereinafter, "Nürnberg Charter").

[1062] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, approved by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to para. 2 of Security Council resolution 808 (1993), S/25704 and Add.1, annex, art. 7, para. 1.

[1063] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994, Security Council resolution 955 (1994) of 8 November 1994, annex, art. 6, para. 1.

[1064] See Rome Statute (footnote 1054 above), art. 25, paras. 2 and 3 (a).

[1065] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, art. 6, para. 1 (hereinafter, "Statute of the Special Court for Sierra Leone").

[1066] United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5 (2000) (hereinafter, "East Timor Tribunal Charter").

[1067] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), art. 5, available from www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended (accessed on 22 June 2016, hereinafter "Extraordinary Chambers of Cambodia Agreement"). See also Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, p. 117.

[1068] Statute of the Iraqi Special Tribunal, *International Legal Materials*, vol. 43, p. 231, art. 10 (b) (2004) (hereinafter, "Supreme Iraqi Criminal Tribunal statute"). The Iraqi Interim Government enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal's name to "Supreme Iraqi Criminal Tribunal". See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

Chambers within the Senegalese Judicial System[1069] all provide for the criminal responsibility of a person who "commits" crimes against humanity. National laws that address crimes against humanity invariably criminalize the "commission" of such crimes. Treaties addressing other types of crimes also invariably call upon States parties to adopt national laws proscribing "commission" of the offence. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the "commission" of genocide.[1070]

(10) Second, all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in some way other than "commission" of the offence. Such conduct may take the form of an "attempt" to commit the offence, or acting as an "accessory" or "accomplice" to the offence or an attempted offence. With respect to an "attempt" to commit the crime, the statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone contain no provision for such responsibility. In contrast, the Rome Statute provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime.[1071] In the *Banda and Jerbo* case, a pre-trial chamber asserted that criminal responsibility for attempt "requires that, in the ordinary course of events, the perpetrator's conduct [would] have resulted in the crime being completed, had circumstances outside the perpetrator's control not intervened".[1072]

(11) Third, with respect to "accessorial" responsibility, such a concept is addressed in international instruments through various terms, such as "ordering", "soliciting", "inducing", "instigating", "inciting", "aiding and abetting", "conspiracy to commit", "being an accomplice to", "participating in" or "joint criminal enterprise". Thus, the statute of the International Criminal Tribunal for the former Yugoslavia provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[1073] The statute of the International Criminal Tribunal for Rwanda uses virtually identical language.[1074] Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.[1075]

[1069] Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990, *International Law Materials*, vol. 52, p. 1028, arts. 4 (b) and 6 (2013) (hereinafter, "Extraordinary African Chambers statute").

[1070] Convention on the Prevention and Punishment of the Crime of Genocide, arts. III (a) and IV.

[1071] Rome Statute (see footnote 1054 above), art. 25, para. 3 (f).

[1072] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the "Decision on the Confirmation of Charges of 7 March 2011", International Criminal Court, Pre-Trial Chamber I, para. 96.

[1073] Statute of the International Criminal Tribunal for the former Yugoslavia (see footnote 1062 above), art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber, judgment of 15 July 1999, International Criminal Tribunal for the former Yugoslavia, *Judicial Reports 1999*, para. 220 (hereinafter, "*Tadić 1999*") (finding that "the notion of common design as a form of accomplice liability is firmly established in customary international law").

[1074] Statute of the International Criminal Tribunal for Rwanda (see footnote 1063 above), art. 6, para. 1.

[1075] See, for example, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber II, judgment of 10 December 1998, International Criminal Tribunal for the former Yugoslavia, *Judicial Reports 1998*, para. 246 (finding that: "If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor").

Similarly, the instruments regulating the Special Court for Sierra Leone,[1076] the Special Panels for Serious Crimes in East Timor,[1077] the Extraordinary Chambers in the Courts of Cambodia,[1078] the Supreme Iraqi Criminal Tribunal[1079] and the Extraordinary African Chambers within the Senegalese Judicial System[1080] all provide for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

(12) The Rome Statute provides for criminal responsibility if the person commits "such a crime … through another person", if the person "[o]rders, solicits or induces the commission of the crime which in fact occurs or is attempted", if the person for "the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" or if the person in "any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with common purpose", subject to certain conditions.[1081] The Commission decided to use the various terms set forth in the Rome Statute as the basis for the terms used in draft article 5, paragraph 2.

(13) In these various international instruments, the related concepts of "soliciting", "inducing" and "aiding and abetting" the crime are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence. Indeed, the Convention on the Prevention and Punishment of the Crime of Genocide addresses not just the commission of genocide, but also "[c]onspiracy to commit genocide", "[d]irect and public incitement to commit genocide", an "[a]ttempt to commit genocide" and "[c]omplicity in genocide".[1082] The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity broadly provides that: "If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."[1083]

(14) Further, the concept in these various instruments of "ordering" the crime differs from (and complements) the concept of "command" or other superior responsibility. Here, "ordering" concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. In contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a failure to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

(15) Treaties addressing crimes other than crimes against humanity typically provide for criminal responsibility of persons who participate in the commission of the offence, using broad terminology that does not seek to require States to alter the preferred terminology or modalities that are well settled in national law. In other words, such treaties use general

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[1076] Statute of the Special Court for Sierra Leone (see footnote 1065 above), art. 6, para. 1.

[1077] East Timor Tribunal Charter (see footnote 1066 above), sect. 14.

[1078] Extraordinary Chambers of Cambodia Agreement (see footnote 1067 above), art. 29.

[1079] Supreme Iraqi Criminal Tribunal Statute (see footnote 1068 above), art. 15.

[1080] Extraordinary African Chambers Statute (see footnote 1069 above), art. 10.

[1081] Rome Statute (see footnote 1054), art. 25, para. 3 (a-d).

[1082] Convention on the Prevention and Punishment of the Crime of Genocide, art. III (b)-(e).

[1083] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 2.

terms rather than detailed language, allowing States to spell out the precise details of the criminal responsibility through existing national statutes, jurisprudence and legal tradition. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance broadly provides: "Each State Party shall take the necessary measures to hold criminally responsible at least … [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance."[1084] The language of draft article 5, paragraph 2, takes the same approach.

Command or other superior responsibility

(16) Draft article 5, paragraph 3, addresses the issue of command or other superior responsibility. In general, this paragraph provides that superiors are criminally responsible for crimes against humanity committed by subordinates, in circumstances where the superior has engaged in a dereliction of duty with respect to the subordinates' conduct.

(17) International jurisdictions that have addressed crimes against humanity impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances.[1085] Notably, the Nürnberg and Tokyo tribunals used command responsibility with respect to both military and civilian commanders, an approach that influenced later tribunals.[1086] As indicated by a trial chamber of the International Criminal Tribunal for Rwanda in *The Prosecutor v. Alfred Musema*: "As to whether the form of individual criminal responsibility referred to under Article 6(3) of the [International Criminal Tribunal for Rwanda] Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle."[1087]

(18) The statute of the International Criminal Tribunal for the former Yugoslavia provides that: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[1088] Several defendants were convicted by the International Criminal Tribunal for the former Yugoslavia on such a basis.[1089] The same language appears in the statute of the International Criminal Tribunal for Rwanda,[1090] which also convicted several defendants on such a basis.[1091] Similar

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[1084] International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

[1085] See, for example, *United States of America v. Wilhelm von Leeb, et al.* ("The High Command Case"), in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. 11 (Washington D.C., United States Government Printing Office, 1950), pp. 543-544.

[1086] *Ibid.*; see also *International Criminal Law: International Enforcement*, M.C. Bassiouni, ed., vol. III, 3rd ed. (Leiden, Martinus Nijhoff, 2008, p. 461); and K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), pp. 262–263.

[1087] See *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, International Criminal Tribunal for Rwanda, Trial Chamber I, judgment and sentence of 27 January 2000, para. 132.

[1088] Statute of the International Criminal Tribunal for the former Yugoslavia (see footnote 1062 above), art. 7, para. 3.

[1089] See, for example, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, judgment of 25 June 1999, paras. 66-77; *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, judgment of 16 November 1998, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, paras. 330-400 and 605-810.

[1090] Statute of the International Criminal Tribunal for Rwanda (see footnote 1063 above), art. 6, para. 3.

language appears in the instruments regulating the Special Court for Sierra Leone,[1092] the Special Tribunal for Lebanon,[1093] the Special Panels for Serious Crimes in East Timor,[1094] the Extraordinary Chambers in the Courts of Cambodia,[1095] the Supreme Iraqi Criminal Tribunal[1096] and the Extraordinary African Chambers within the Senegalese Judicial System.[1097]

(19) Article 28 of the Rome Statute contains a detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander with regard to the acts of others.[1098] As a general matter, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the commander knew or should have known that his or her subordinates were committing or about to commit the offence; and (c) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution. This standard has begun influencing the development of "command responsibility" in national legal systems, both in the criminal and civil contexts. Article 28 also addresses the issue of other "superior and subordinate relationships" arising in a non-military or civilian context. Such superiors include civilians that "lead" but are not "embedded" in military activities. Here, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the civilian superior knew or consciously disregarded information regarding the offences; (c) the offences concerned activities that were within the effective responsibility and control of the superior; and (d) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress commission of all the offences or to submit the matter for investigation and prosecution.

(20) A trial chamber of the International Criminal Court applied this standard when convicting Jean-Pierre Bemba Gombo in March 2016 of crimes against humanity. Among other things, the trial chamber found that Mr. Bemba was a person effectively acting as a military commander who knew that the Mouvement de Libération du Congo forces under his effective authority and control were committing or about to commit the crimes charged. Additionally, the trial chamber found that Mr. Bemba failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates during military operations in 2002 and 2003 in the Central African Republic or to submit the matter to the competent authorities after crimes were committed.[1099]

(21) National laws also often contain this type of criminal responsibility for war crimes, genocide and crimes against humanity, but differing standards are used. Moreover, some States have not developed such a standard in the context of crimes against humanity. For

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[1091] See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber, judgment of 2 September 1998; *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, International Criminal Tribunal for Rwanda, Trial Chamber, judgment and sentence of 4 September 1998.

[1092] Statute of the Special Court for Sierra Leone (see footnote 1065 above), art. 6, para. 3.

[1093] Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (annex and attachment included), art. 3, para. 2.

[1094] East Timor Tribunal Charter (see footnote 1066 above), sect. 16.

[1095] Extraordinary Chambers of Cambodia Agreement (see footnote 1067 above), art. 29.

[1096] Supreme Iraqi Criminal Tribunal statute (see footnote 1068 above), art. 15.

[1097] Rome Statute (see footnote 1054), art. 28. Agreement on the Extraordinary African Chambers statute (see footnote 1069 above), art. 10.

[1098] See, for example, *The Prosecutor v. Dario Kordić and Mario Cerkez*, Case. No. IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, judgment of 26 February 2001, at para. 369.

[1099] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, International Criminal Court, Trial Chamber III, judgment of 21 March 2016, paras. 630, 638 and 734.

these reasons, the Commission viewed it appropriate to elaborate a clear standard so as to encourage harmonization of national laws on this issue.[1100] To that end, draft article 5, paragraph 3, is modelled on the standard set forth in the Rome Statute.

(22) Treaties addressing offences other than crimes against humanity also often acknowledge an offence in the form of command or other superior responsibility.[1101]

Superior orders

(23) Draft article 5, paragraph 4, provides that each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate.

(24) All jurisdictions that address crimes against humanity provide grounds for excluding criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffered from a mental disease that prevented the person from appreciating the unlawfulness of his or her conduct. Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances. The fact that the person acted in self-defence may also preclude responsibility, as may duress resulting from a threat of imminent harm or death. In some instances, the person must have achieved a certain age to be criminally responsible. The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.

(25) At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defence to criminal responsibility that they were ordered by a superior to commit the offence.[1102] Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Consistent with article 8, the International Military Tribunal found that the fact that "a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality".[1103] Likewise, article 6 of the Tokyo Tribunal provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be

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[1100] See Commission on Human Rights report on the sixty-first session, *Official Records of the Economic and Social Council, 2005, Supplement No. 3* (E/2005/23-E/CN.4/2005/135), resolution 2005/81 on impunity of 21 April 2005, para. 6 (urging "all States to ensure that all military commanders and other superiors are aware of the circumstances in which they may be criminally responsible under international law for … crimes against humanity … including, under certain circumstances, for these crimes when committed by subordinates under their effective authority and control").

[1101] See, for example, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 86, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, at art. 6, para. 1.

[1102] See Commission on Human Rights, resolution 2005/81 on impunity (footnote 1100 above), para. 6 (urging all States "to ensure that all relevant personnel are informed of the limitations that international law places on the defence of superior orders").

[1103] *Trial of the Major War Criminals* … (see footnote 1051 above), p. 466.

considered in mitigation of punishment if the Tribunal determines that justice so requires."[1104]

(26) While article 33 of the Rome Statute allows for a limited superior orders defence, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the defence. The instruments regulating the International Criminal Tribunal for the former Yugoslavia,[1105] the International Criminal Tribunal for Rwanda,[1106] the Special Court for Sierra Leone,[1107] the Special Tribunal for Lebanon,[1108] the Special Panels for Serious Crimes in East Timor,[1109] the Extraordinary Chambers in the Courts of Cambodia,[1110] the Supreme Iraqi Criminal Tribunal[1111] and the Extraordinary African Chambers within the Senegalese Judicial System[1112] all similarly exclude superior orders as a defence. While superior orders are not permitted as a defence to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage.[1113]

(27) Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes, such as: the 1984 Convention against Torture;[1114] the 1985 Inter-American Convention to Prevent and Punish Torture;[1115] the 1994 Inter-American Convention on Forced Disappearance of Persons;[1116] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[1117] In the context of the Convention against Torture, the Committee against Torture has criticized national

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[1104] Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946) (as amended on 26 April 1946), *Treaties and Other International Agreements of the United States of America 1776-1949*, vol. 4, C. Bevans ed. (Washington, D.C., Department of State, 1968), p. 20, at p. 23, art. 6 (hereinafter, "Tokyo Charter").

[1105] Statute of the International Criminal Tribunal for the former Yugoslavia (see footnote 1062 above), art. 7, para. 4.

[1106] Statute of the International Criminal Tribunal for Rwanda (see footnote 1063 above), art. 6, para. 4.

[1107] Statute of the Special Court for Sierra Leone (see footnote 1065 above), art. 6, para. 4.

[1108] Statute of the Special Tribunal for Lebanon (see footnote 1093 above), art. 3, para. 3.

[1109] East Timor Tribunal Charter (see footnote 1066 above), sect. 21.

[1110] Extraordinary Chambers of Cambodia Agreement (see footnote 1067 above), art. 29.

[1111] Supreme Iraqi Criminal Tribunal statute (see footnote 1068 above), art. 15.

[1112] Extraordinary African Chambers statute (see footnote 1069 above), art. 10, para. 5.

[1113] See, for example, statute of the International Criminal Tribunal for the former Yugoslavia (footnote 1062 above), art. 7, para. 4; statute of the International Criminal Tribunal for Rwanda (footnote 1063 above), art. 6, para. 4; statute of the Special Court for Sierra Leone (footnote 1065 above), art. 6, para. 4; East Timor Tribunal Charter (footnote 1066 above), sect. 21.

[1114] Convention against Torture, art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

[1115] Inter-American Convention to Prevent and Punish Torture, art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

[1116] Inter-American Convention on Forced Disappearance of Persons, art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

[1117] International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), at para. 72 (see also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 6).

legislation that permits such a defence or is ambiguous on the issue.[1118] In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defence.[1119]

Statutes of limitations

(28) One possible restriction on the prosecution of a person for crimes against humanity in national law concerns the application of a "statute of limitations" (or "period of prescription"), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution. Draft article 5, paragraph 5, provides that each State shall take the necessary measures to ensure that the offences referred to in the draft article shall not be subject to any statute of limitations.

(29) No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg or Tokyo charters, or in the constituent instruments of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone. In contrast, Control Council Law No. 10, adopted in December 1945 by the Allied Control Council for Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes and crimes against the peace) "the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945".[1120] Likewise, the Rome Statute expressly addresses the matter, providing that: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."[1121] The drafters of the Rome Statute strongly supported this provision as applied to crimes against humanity.[1122] Similarly, the Law on the Establishment of Extraordinary Chambers in Cambodia, the Supreme Iraqi Criminal Tribunal and the East Timor Tribunal Charter all explicitly defined crimes against humanity as offences for which there is no statute of limitations.[1123]

[1118] Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Guatemala, para. 32 (13).

[1119] See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44* (A/59/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Chile, para. 56 (i); see also, *ibid., Sixtieth Session, Supplement No. 44* (A/60/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Argentina, para. 31 (a) (praising Argentina for declaring its due obedience act "absolutely null and void").

[1120] Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, para. 5, 20 December 1945, in *Official Gazette of the Control Council for Germany*, vol. 3, p. 52 (1946).

[1121] Rome Statute (see footnote 1054 above), art. 29.

[1122] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, document A/CONF.183/13 (vol. II), p. 138, 2nd meeting (A/CONF.183/C.1/SR.2), paras. 45-74.

[1123] Extraordinary Chambers of Cambodia Agreement (see footnote 1067 above), art. 5; statute of the Iraqi Special Tribunal (see footnote 1068 above), art. 17 (d); East Timor Tribunal Charter (see footnote 1066 above), sect. 17.1; see also report of the Third Committee (A/57/806), para. 10 (Khmer Rouge trials) and General Assembly resolution 57/228 B of 13 May 2003. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia were provided jurisdiction over crimes against humanity committed decades prior to its establishment, between 1975 and 1979, when the Khmer Rouge held power.

(30) With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly noted that "the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes".[1124] The following year, States adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which requires State parties to adopt "any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment" of these two types of crimes.[1125] Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which uses substantially the same language.[1126] At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.

(31) Many treaties addressing crimes in national law other than crimes against humanity have not contained a prohibition on a statute of limitations. For example, the Convention against Torture contains no prohibition on the application of a statute of limitations to torture-related offences. Even so, the Committee against Torture has stated that, taking into account their grave nature, such offences should not be subject to any statute of limitations.[1127] Similarly, while the International Covenant on Civil and Political Rights[1128] does not directly address the issue, the Human Rights Committee has called for the abolition of statutes of limitations in relation to serious violations of the Covenant.[1129] In contrast, the International Convention for the Protection of All Persons from Enforced Disappearance does address the issue of statutes of limitations, providing that: "A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) Is of long duration and is proportionate to the extreme seriousness of this offence."[1130] The *travaux préparatoires* of the Convention indicate that this provision was intended to distinguish between those offences that might constitute a crime against humanity — for

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[1124] General Assembly resolution 2338 (XXII) of 18 December 1967, entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity"; see also General Assembly resolution 2712 (XXV) of 15 December 1970; General Assembly resolution 2840 (XXVI) of 18 December 1971.

[1125] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. IV.

[1126] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974), Council of Europe, *European Treaty Series*, No. 82, art. 1.

[1127] See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 44* (A/62/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Italy, para. 40 (19).

[1128] International Covenant for Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[1129] See, for example, report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40* (A/63/40), vol. I, chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant and of country situations in the absence of a report resulting in public concluding observations, Panama (sect. A, para. 79), at para. (7).

[1130] International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1 (a). In contrast, the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations.

which there should be no statute of limitations — and all other offences under the Convention.[1131]

Appropriate penalties

(32) Draft article 5, paragraph 6, provides that each State shall ensure that the offences referred to in the article shall be punishable by appropriate penalties that take into account the grave nature of the offences.

(33) The Commission provided in its 1996 draft code of crimes against the peace and security of mankind that: "An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime."[1132] The commentary further explained that the "character of a crime is what distinguishes that crime from another crime … The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author."[1133] Thus, "while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty."[1134]

(34) To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The statute of the International Criminal Tribunal for the former Yugoslavia provides that: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."[1135] Furthermore, the International Criminal Tribunal for the former Yugoslavia is to "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".[1136] The statute of the International Criminal Tribunal for Rwanda includes identical language, except that recourse is to be had to "the general practice regarding prison sentences in the courts of Rwanda".[1137] Even for convictions for the most serious crimes of international concern, this can result in a wide range of sentences. Article 77 of the Rome Statute also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".[1138] Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,[1139] the Special Tribunal for Lebanon,[1140] the Special Panels for Serious Crimes in East Timor,[1141] the Extraordinary Chambers in the Courts of Cambodia,[1142] the Supreme Iraqi Criminal Tribunal,[1143] and the Extraordinary African

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[1131] Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59) (see footnote 1117 above), paras. 43-46 and 56.

[1132] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, art. 3

[1133] *Ibid.*, para. (3) of the commentary to art. 3.

[1134] *Ibid.*

[1135] Statute of the International Criminal Tribunal for the former Yugoslavia (see footnote 1062 above), art. 24, para. 1.

[1136] *Ibid.*, art. 24, para. 2.

[1137] Statute of the International Tribunal for Rwanda (see footnote 1063 above), art. 23, para. 1.

[1138] Rome Statute (see footnote 1054 above), art. 77.

[1139] Statute of the Special Court for Sierra Leone (see footnote 1065 above), art. 19.

[1140] Statute of the Special Tribunal for Lebanon (see footnote 1093 above), art. 24.

[1141] East Timor Tribunal Charter (see footnote 1066 above), sect. 10.

[1142] Extraordinary Chambers of Cambodia Agreement (see footnote 1067 above), art. 39.

[1143] Supreme Iraqi Criminal Tribunal statute (see footnote 1068 above), art. 24

Chambers within the Senegalese Judicial System.[1144] Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be commensurate with the gravity of the offence.

(35) International treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, allow them the discretion to determine the punishment, based on the circumstances of the particular offender and offence.[1145] The Convention on the Prevention and Punishment of the Crime of Genocide simply calls for "effective penalties for persons guilty of genocide or any of the other acts enumerated …".[1146] The 1949 Geneva Conventions also provide a general standard and leave to individual States the discretion to set the appropriate punishment, by simply requiring: "The High Contracting Parties [to] undertake to enact any legislation necessary to provide effective penal sanctions for … any of the grave breaches of the present Convention …."[1147] More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be "appropriate". Although the Commission initially proposed the term "severe penalties" for use in its draft articles on diplomatic agents and other protected persons, the term "appropriate penalties" was instead used by States in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.[1148] That term has served as a model for subsequent treaties. At the same time, the provision on "appropriate" penalties in the 1973 Convention was accompanied by language calling for the penalty to take into account the "grave nature" of the offence. The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important "world interests" at stake in punishing such an offence.[1149] Since 1973, this approach — that each "State Party shall make these offences punishable by the appropriate penalties which take into account their grave nature" — has been adopted for numerous treaties, including the Convention against

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[1144] Extraordinary African Chambers Statute (see footnote 1069 above), art. 24.

[1145] See the report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 58 (indicating that "[s]everal delegations welcomed the room for manoeuvre granted to States" in this provision); report of the Ad hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 39* (A/32/39), annex I (Summary records of the 1st to the 19th meetings of the Committee), 13th meeting (15 August 1977), para. 4 (similar comments by the representative of the United States of America); Commission on Human Rights resolution 2005/81 on impunity (see footnote 1100 above), para. 15 (calling upon "all States … to ensure that penalties are appropriate and proportionate to the gravity of the crime").

[1146] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

[1147] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146; see 2016 ICRC Commentary on art. 49 (see footnote 1060 above), paras. 2838-2846.

[1148] See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2 ("[e]ach State Party shall make these crimes punishable by appropriate penalties …").

[1149] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), para. (12) of the commentary to draft article 2, para. 2.

Torture.[1150] In some treaties, the issue of gravity is expressed using terms such as "extreme seriousness", "serious nature" or "extreme gravity" of the offences.[1151]

Legal persons

(36) Paragraphs 1 to 6 of draft article 5 are directed at criminal liability of offenders who are natural persons, although the term "natural" is not used, which is consistent with the approach taken in treaties addressing crimes. Paragraph 7, in contrast, addresses the liability of "legal persons" for the offences referred to in draft article 5.

(37) Criminal liability of legal persons has become a feature of the national laws of many States in recent years, but it is still unknown in many other States.[1152] In States where the concept is known, such liability sometimes exists with respect to international crimes.[1153] Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors, officers, or through some other position or agency of the legal person. Such liability, in States where the concept exists, is typically imposed when the offence at issue was committed by a natural person on behalf of or for the benefit of the legal person.

(38) Criminal liability of legal persons has not featured significantly to date in the international criminal courts or tribunals. The Nürnberg Charter, in articles 9 and 10, authorized the International Military Tribunal to declare any group or organization as a criminal organization during the trial of an individual, which could lead to the trial of other individuals for membership in the organization. In the course of the Tribunal's proceedings, as well as subsequent proceedings under Control Council Law No. 10, a number of such organizations were so designated, but only natural persons were tried and punished.[1154] The International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda did not have criminal jurisdiction over legal persons, nor does the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal, or the Extraordinary African Chambers within the Senegalese Judicial System. The drafters of the Rome Statute noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute"[1155] and, although

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[1150] Convention against Torture, art. 4; see also Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 4 (b); International Convention for the Suppression of the Financing of Terrorism, art. 4 (b); OAU Convention on the Prevention and Combating of Terrorism, art. 2 (a).

[1151] See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Inter-American Convention to Prevent and Punish Torture, art. 6; Inter-American Convention on Forced Disappearance of Persons, art. III.

[1152] See, for example, Special Tribunal for Lebanon, *New TV S.A.L. Karma Mohamed Tashin Al Khayat, Case No. STL-14-05/PT/AP/AR126.1. Appeals Panel, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings*, at para. 58 (hereinafter, "STL Appeals Decision") ("the practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems").

[1153] See, for example, Ecuador Código Orgánico Integral Penal, *Registro Oficial, Suplemento, Año 1, N° 180*, 10 February 2014, art. 90. Penalty for a legal person (providing, in a section addressing crimes against humanity, that: "When a legal person is responsible for any of the crimes of this Section, it will be penalized by its dissolution").

[1154] See, for example, *United States v. Krauch and others, in Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII-VIII (Washington D.C., Nürnberg Military Tribunals, 1952).

[1155] See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June-17 July 1998, vol. III (A/CONF.183/13), document A/CONF.183/2, art. 23, para. 6, footnote 71.

proposals for inclusion of a provision on such responsibility were made, the Rome Statute ultimately did not contain such a provision.

(39) Liability of legal persons also has not been included in many treaties addressing crimes at the national level, including: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; the 1984 Convention against Torture; the 1997 International Convention for the Suppression of Terrorist Bombings; and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The Commission's 1996 draft code of crimes only addressed the criminal responsibility of "an individual".[1156]

(40) On the other hand, the 2014 African Union protocol amending the statute of the African Court of Justice and Human Rights, though not yet in force, provides jurisdiction to the reconstituted African Court over legal persons for international crimes, including crimes against humanity.[1157] Further, although criminal jurisdiction over legal persons (as well as over crimes against humanity) is not expressly provided for in the statute of the Special Tribunal for Lebanon, the Tribunal's Appeals Panel concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.[1158]

(41) Moreover, there are several treaties that address the liability of legal persons for criminal offences, notably: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;[1159] the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;[1160] the 1999 International Convention for the Suppression of the Financing of Terrorism;[1161] the 2000 United Nations Convention against Transnational Organized Crime;[1162] the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;[1163] the 2003 United Nations Convention against

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[1156] *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, p. 23.

[1157] See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, art. 46C.

[1158] STL Appeals Decision (see footnote 1152 above). The Tribunal ultimately found that the legal person, Al Jadeed TV, was not guilty. See *Al Jadeed [Co.] S.A.L./New T.V.S.A.L.(N.T.V.) Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, Contempt Judge*, Decision of 18 September 2015, Special Tribunal for Lebanon, para. 55 (hereinafter, "STL Contempt Judge Decision"); *Al Jadeed [Co.] S.A.L./New T.V.S.A.L.(N.T.V.) Karna Mohamed Tahsin Al Khayat, Case No. STL-14-05/A/AP, Appeals Panel*, Decision of 8 March 2016.

[1159] See International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243, art. I, para. 2 ("The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid").

[1160] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), *ibid.*, vol. 1673, No. 28911. p. 57, art. 2, para. 14 ("For the purposes of this Convention: ... 'Person' means any natural or legal person") and art. 4, para. 3 ("The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal").

[1161] International Convention for the Suppression of the Financing of Terrorism, art. 5. For the proposals submitted during the negotiations that led to art. 5, see "Measures to eliminate international terrorism: report of the working group" (A/C.6/54/L.2) (26 October 1999).

[1162] United Nations Convention against Transnational Organized Crime, art. 10.

[1163] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000), United Nations, *Treaty Series*, vol. 2171, No. 27531, p. 227.

Corruption;[1164] the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;[1165] and a series of treaties concluded within the Council of Europe.[1166] Other regional instruments address the issue as well, mostly in the context of corruption.[1167] Such treaties typically do not define the term "legal person", leaving it to national legal systems to apply whatever definition would normally operate therein.

(42) The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.

(43) Paragraph 7 of draft article 5 is modelled on the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol was adopted by the General Assembly in 2000 and entered into force in 2002. As of August 2016, 173 States are party to the Optional Protocol and another 9 States have signed but not yet ratified it. Article 3, paragraph 1, of the Optional Protocol obligates States parties to ensure that certain acts are covered under its criminal or penal law, such as the sale of children for sexual exploitation or the offering of a child for prostitution. Article 3, paragraph 4, then reads: "Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative."

(44) Paragraph 7 of draft article 5 uses the same language, but replaces "State Party" with "State" and replaces "for offences established in paragraph 1 of the present article" with "for the offences referred to in this draft article". As such, paragraph 7 imposes an

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[1164] United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E. 10.V.13), pp. 233-235 and *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2nd revised edition, 2012), pp. 107-113. For the analogous convention adopted by the Organisation for Economic Co-operation and Development, see Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 21 November 1997), art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official"), available from www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 11 July 2016).

[1165] Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (London, 14 October 2005), art. 5 (for the 1988 Convention and the Protocol thereto, see United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201).

[1166] See, for example, Council of Europe, *Criminal Law Convention on Corruption* (Strasbourg, 27 January 1999), United Nations, *Treaty Series*, vol. 2216, No. 39391, p. 225, art. 18, supplemented by the Additional Protocol (Strasbourg, 15 May 2003) (relating to bribery of arbitrators and jurors), *ibid.*, vol. 2466, No. 39391, p. 168; European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977), *ibid.*, vol. 1137, No. 17828, p. 93, art. 10.

[1167] See, for example, Inter-American Convention against Corruption, art. 8; Southern African Development Community Protocol against Corruption (Blantyre, Malawi, 14 August 2001), available from www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf, art. 4, para. 2; African Union Convention on Preventing and Combating Corruption, art. 11, para. 1.

obligation upon the State that it "shall take measures", meaning that it is required to pursue such measures in good faith. At the same time, paragraph 7 provides the State with considerable flexibility to shape those measures in accordance with its national law. First, the clause "[s]ubject to the provisions of its national law" should be understood as according to the State considerable discretion as to the measures that will be adopted; the obligation is "subject to" the State's existing approach to liability of legal persons for criminal offences under its national law. For example, in most States, liability of legal persons for criminal offences will only apply under national law with respect to certain types of legal persons and not to others. Indeed, under most national laws, "legal persons" in this context likely excludes States, Governments, other public bodies in the exercise of State authority, and public international organizations.[1168] Likewise, the liability of legal persons under national laws can vary based on: the range of natural persons whose conduct can be attributed to the legal person; which modes of liability of natural persons can result in liability of the legal person; whether it is necessary to prove the *mens rea* of a natural person to establish liability of the legal person; or whether it is necessary to prove that a specific natural person committed the offence.[1169]

(45) Second, each State is obliged to take measures to establish the legal liability of legal persons "where appropriate". Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the specific context of crimes against humanity.

(46) For measures that are adopted, the second sentence of paragraph 7 provides that: "Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative." Such a sentence appears not just in the 2000 Optional Protocol, as discussed above, but also in other widely adhered-to treaties, such as the 2000 United Nations Convention against Transnational Organized Crime[1170] and the 2003 United Nations Convention against Corruption.[1171] The flexibility indicated in such language again acknowledges and accommodates the diversity of approaches adopted within national legal systems. As such, there is no obligation to establish criminal liability if doing so is inconsistent with a State's national legal principles; in those cases, a form of civil or administrative liability may be used as an alternative. In any event, whether criminal, civil or administrative, such liability is without prejudice to the criminal liability of natural persons provided for in draft article 5.

Article 6
Establishment of national jurisdiction

[1168] The Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, art. 1 (d), "For the purposes of this Convention: … 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations").

[1169] For a brief overview of divergences in various common law and civil law jurisdictions on liability of legal persons, see STL Contempt Judge Decision (footnote 1152 above), paras. 63-67.

[1170] At art. 10, para. 2 ("Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative"); see also the International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 1 ("Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative").

[1171] At art. 26, para. 2 ("Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative").

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Commentary

(1) Draft article 6 provides that each State must establish jurisdiction over the offences referred to in draft article 5 in certain cases, such as when the crime occurs in territory under its jurisdiction, has been committed by one of its nationals or when the offender is present in territory under its jurisdiction.

(2) As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission's 1996 draft code of crimes against the peace and security of mankind, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes" set out in the draft code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed".[1172] The breadth of such jurisdiction was necessary because: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court."[1173] The preamble to the Rome Statute provides "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", and further "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

(3) As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Human Rights Commission convened to draft an international instrument on enforced disappearance concluded that: "The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective."[1174] At

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[1172] *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, art. 8.

[1173] *Ibid.*, para. (5) of the commentary to art. 8.

[1174] Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

the same time, such treaties typically only obligate a State party to exercise its jurisdiction when an alleged offender is present in the State party's territory (see draft article 8 below), leading either to a submission of the matter to the prosecuting authorities within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see draft article 9 below).

(4) Reflecting on the acceptance of such an obligation in treaties, and in particular within the Convention against Torture, the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, stated:

> "The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases."[1175]

(5) Provisions comparable to those appearing in draft article 6 exist in many treaties addressing crimes.[1176] While no treaty yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their separate opinion that:

> "The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking [and] torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted."[1177]

(6) Draft article 6, paragraph 1 (a), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction". Rather than refer solely to a State's "territory", the Commission considered it appropriate to refer to territory "under [the State's] jurisdiction", which is intended to encapsulate the territory *de jure* of the State, as well as territory under its jurisdiction or *de*

[1175] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 451, para. 75.

[1176] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971, United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177, art. 5, para. 1 (a)-(b); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 3; International Convention Against the Taking of Hostages, art. 5; Inter-American Convention to Prevent and Punish Torture, art. 12; Convention against Torture, art. 5; Convention on the Safety of United Nations and Associated Personnel, art. 10; Inter-American Convention on Forced Disappearance of Persons, art. IV; International Convention for the Suppression of Terrorist Bombings, art. 6; International Convention for the Suppression of the Financing of Terrorism, art. 7; OAU Convention on the Prevention and Combating of Terrorism, art. 6, para. 1; United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, paras 1-2; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VII, paras. (1)-(3).

[1177] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 51.

facto control. Such terminology aligns with the formulations used by relevant treaties in the field. The text of draft article 4 will need to be revisited in the future to ensure consistency in terminology.[1178] Further, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State; indeed, States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.

(7) Draft article 6, paragraph 1 (b), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". Paragraph 1 (b) also indicates that the State may, on an optional basis, establish jurisdiction where the offender is "a stateless person who is habitually resident in the territory of that State". This formulation is based on the language of certain existing conventions, such as article 5, paragraph 1 (b), of the International Convention Against the Taking of Hostages.

(8) Draft article 6, paragraph 1 (c), concerns jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction". Given that many States prefer not to exercise this type of jurisdiction, this jurisdiction is optional; a State may establish such jurisdiction "if that State considers it appropriate", but the State is not obliged to do so. This formulation is also based on the language of a wide variety of existing conventions.

(9) Draft article 6, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in the territory under the State's jurisdiction and the State does not extradite or surrender the person in accordance with the present draft articles. In such a situation, even if the crime was not committed in its territory, the alleged offender is not its national and the victims of the crime are not its nationals, the State nevertheless is obligated to establish jurisdiction given the presence of the alleged offender in territory under its jurisdiction. This obligation helps to prevent an alleged offender from seeking refuge in a State that otherwise has no connection with the offence.

(10) Draft article 6, paragraph 3, makes clear that, while each State is obligated to enact these types of jurisdiction, it does not exclude any other jurisdiction that is available under the national law of that State. Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, and without prejudice to any applicable rules of international law, treaties addressing crimes typically leave open the possibility that a State party may have established other jurisdictional grounds upon which to hold an alleged offender accountable.[1179] In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal cited, *inter alia*, such a provision in the Convention against Torture, and stated:

[1178] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. VII, sect. C., art. 4, para. 1 (a) (referring to "any territory under its jurisdiction or control").

[1179] See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime (A/AC.254/4/Rev.4), footnote 102, p. 20; see also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, European Treaty Series, No. 173, para. 83 ("Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well.").

> "We reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis."[1180]

(11) Establishment of the various types of national jurisdiction set out in draft article 6 are important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 9 below. In his separate opinion in the *Arrest Warrant* case, Judge Guillaume remarked on the "system" set up under treaties of this sort:

> "Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited.* Thus, universal punishment of all the offences in question is assured, as the perpetrators are denied refuge in all States."[1181]

Article 7
Investigation

> Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Commentary

(1) Draft article 7 addresses situations where there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in territory under a State's jurisdiction. That State is best situated to conduct such an investigation, so as to determine whether crimes in fact have occurred or are occurring and, if so, whether governmental forces under its control committed the crimes, whether forces under the control of another State did so or whether they were committed by members of a non-State organization. Such an investigation can lay the foundation not only for identifying alleged offenders and their location, but also for helping to prevent the continuance of ongoing crimes or their recurrence by identifying their source. Such an investigation should be contrasted with a preliminary inquiry into the facts concerning a particular alleged offender who is present in a State, which is addressed below in draft article 8, paragraph 2.

(2) A comparable obligation has featured in some treaties addressing other crimes.[1182] For example, article 12 of the Convention against Torture provides: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." That obligation is different from the State party's obligation under article 6, paragraph 2, of the Convention against Torture to undertake an inquiry into the facts concerning a particular alleged offender. As indicated, article 12 of

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[1180] *Arrest Warrant of 11 April 2000* (see footnote 1177 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 51.

[1181] *Ibid.*, Separate Opinion of Judge Guillaume, at para. 9 (emphasis added).

[1182] See, for example, Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 2; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *European Treaty Series*, No. 210, art. 55, para. 1.

the Convention against Torture requires that the investigation be carried out whenever there is "reasonable ground to believe" that the offence has been committed, regardless of whether victims have formally filed complaints with the State's authorities.[1183] Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints that will be made, a violation of article 12 of the Convention against Torture is possible even if the State has received no such complaints. The Committee against Torture has indicated that State authorities must "proceed automatically" to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with "no special importance being attached to the grounds for the suspicion".[1184]

(3) The Committee against Torture has also found violations of article 12 if the State's investigation is not "prompt and impartial".[1185] The requirement of promptness means that as soon as there is suspicion of a crime having been committed, investigations should be initiated immediately or without any delay. In most cases where the Committee found a lack of promptness, no investigation had been carried out at all or had only been commenced after a long period of time had passed. For example, the Committee considered "that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention".[1186] The rationale underlying the promptness requirement is that physical traces that may prove torture can quickly disappear and that victims may be in danger of further torture, which a prompt investigation may be able to prevent.[1187]

(4) The requirement of impartiality means that States must proceed with their investigations in a serious, effective and unbiased manner. In some instances, the Committee against Torture has recommended that investigation of offences be "under the direct supervision of independent members of the judiciary".[1188] In other instances, it has stated that "all government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so".[1189] The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.[1190]

(5) Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. For example, although the International

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[1183] See *Encarnacion Blanco Abad v. Spain*, Communication No. 59/1996, 14 May 1998, para. 8.2, in report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex X, sect. A.3; *Danilo Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, 16 November 2005, para. 7.3, *ibid., Sixty-first Session, Supplement No. 44* (A/61/44), annex VIII, sect. A.

[1184] See *Dhaou Belgacem Thabti v. Tunisia*, Communication No. 187/2001, 14 November 2003, para. 10.4, *ibid., Fifty-ninth Session, Supplement No. 44* (A/59/44), annex VII, sect. A.

[1185] See, for example, *Bairamov v. Kazakhstan*, Communication No. 497/2012, 14 May 2014, paras. 8.7-8.8, *ibid., Sixty-ninth Session, Supplement No. 44* (A/69/44), annex XIV.

[1186] *Qani Halimi-Nedzibi v. Austria*, Communication No. 8/1991, 18 November 1993, para. 13.5, *ibid., Forty-ninth Session, Supplement No. 44* (A/49/44), annex V.

[1187] *Encarnacion Blanco Abad v. Spain* (see footnote 1183 above), para. 8.2.

[1188] Report of the Committee against Torture, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44* (A/49/44), chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Ecuador, paras. 97-105, at para. 105.

[1189] *Ibid., Fifty-sixth Session, Supplement No. 44* (A/56/44), chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Guatemala, paras. 67-76, at para. 76 (d).

[1190] *Khaled Ben M'Barek v. Tunisia*, Communication No. 60/1996, 10 November 1999, paras. 11.9-11.10, *ibid., Fifty-fifth Session, Supplement No. 44* (A/55/44), annex VIII, sect. A.

Covenant on Civil and Political Rights contains no such express obligation, the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations of the Covenant.[1191] Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.[1192]

Article 8
Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Commentary

(1) Draft article 8 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present. Paragraph 1 calls upon the State to take the person into custody or take other legal measures to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. Such measures are a common step in national criminal proceedings, in particular to avoid further criminal acts and a risk of flight by the alleged offender.

(2) Paragraph 2 provides that the State shall immediately make a preliminary inquiry into the facts. The national criminal laws of States typically provide for such a preliminary inquiry to determine whether a prosecutable offence exists.

(3) Paragraph 3 provides that the State shall also immediately notify the States referred to in draft article 6, paragraph 1, of its actions, and whether it intends to exercise

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[1191] See Human Rights Committee, general comment No. 31, para. 15 (report of the Human Rights Committee, *Official records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III); see also *Nazriev v. Tajikistan*, Communication No. 1044/2002, views adopted on 17 March 2006, para. 8.2 (*ibid., Sixty-first Session, Supplement No. 40* (A/61/40), vol. II, annex V, sect. P); *Kouidis v. Greece*, Communication No. 1070/2002, views adopted on 28 March 2006, para. 9 (*ibid.*, sect. T); *Agabekov v. Uzbekistan*, Communication No. 1071/2002, views adopted on 16 March 2007, para. 7.2 (*ibid.*, Sixty-second Session, Supplement No. 40 (A/62/40), vol. II, annex VII, sect. I); *Karimov v. Tajikistan* and *Nursatov v. Tajikistan*, Communication Nos. 1108/2002 and 1121/2002, Views adopted on 26 March 2007, para. 7.2 (*ibid.*, sect. H).

[1192] See, for example, European Court of Human Rights, *Ergi v. Turkey*, 28 July 1998, *Reports of Judgments and Decisions 1998-IV*, paras. 82, 85-86; *Bati and Others v. Turkey*, Nos. 33097/96 and 57834/00, ECHR 2004-IV, para. 133; *Paniagua Morales et al. v. Guatemala*, judgment of 8 March 1998, Inter-American Court of Human Rights, Series C, No. 37; *Extrajudicial Executions and Forced Disappearances of Persons v. Peru, Report No. 101/01*, 11 October 2001, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.114 doc. 5 rev., p. 563.

jurisdiction. Doing so allows those other States to consider whether they wish to exercise jurisdiction, in which case they might seek extradition. In some situations, the State may not be fully aware of which other States have established jurisdiction (such as a State that optionally has established jurisdiction with respect to a stateless person who is habitually resident in that State's territory): in such situations, the feasibility of fulfilling the obligation may depend on the circumstances.

(4) Both the General Assembly and the Security Council have recognized the importance of such preliminary measures in the context of crimes against humanity. Thus, the General Assembly has called upon "all the States concerned to take the necessary measures for the thorough investigation of … crimes against humanity … and for the detection, arrest, extradition and punishment of all … persons guilty of crimes against humanity who have not yet been brought to trial or punished".[1193] Similarly, it has said that "refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of … crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law".[1194] The Security Council has emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for … crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation".[1195]

(5) Treaties addressing crimes typically provide for such preliminary measures,[1196] such as article 6 of the Convention against Torture.[1197] Reviewing, *inter alia*, the provisions contained in article 6, the International Court of Justice has explained that "incorporating the appropriate legislation into domestic law … would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts …, a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution …". [1198] The Court found that the preliminary inquiry is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who conduct the inquiry have the task of drawing up a case file containing relevant facts and evidence; "this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned".[1199] The Court further noted that "the choice of means for conducting the inquiry remains in the hands of the States Parties", but that "steps must be taken as soon as the suspect is identified in the

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[1193] General Assembly resolution 2583 (XXIV) of 15 December 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 1.

[1194] General Assembly resolution 2840 (XXVI) of 18 December 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 4.

[1195] Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

[1196] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 6; International Convention Against the Taking of Hostages, art. 6; Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Suppression of Terrorist Bombings, art. 7; International Convention for the Suppression of the Financing of Terrorism, art. 9; OAU Convention on the Prevention and Combating of Terrorism, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII.

[1197] Convention against Torture, art. 6.

[1198] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 1175 above), p. 450, para. 72.

[1199] *Ibid.*, p. 453, para. 83.

territory of the State, in order to conduct an investigation of that case".[1200] Further, the purpose of such preliminary measures is "to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the objective and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts".[1201]

Article 9
Aut dedere aut judicare

> The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Commentary

(1) Draft article 9 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the alleged offender to prosecution within the State's national system. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal tribunal that is willing and able itself to submit the matter to prosecution. This obligation is commonly referred to as the principle of *aut dedere aut judicare*, a principle that has been recently studied by the Commission[1202] and that is contained in numerous multilateral treaties addressing crimes.[1203] While a literal translation of *aut dedere aut judicare* may not fully capture the meaning of this obligation, the Commission chose to retain the term in the title, given its common use when referring to an obligation of this kind.

(2) The Commission's 1996 draft code of crimes against the peace and security of mankind defined crimes against humanity in article 18 and further provided, in article 9, that: "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual."[1204]

(3) Most multilateral treaties containing such an obligation[1205] use what is referred to as "The Hague formula", after the 1970 Hague Convention for the Suppression of Unlawful

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[1200] *Ibid.*, p. 454, para. 86.

[1201] *Ibid.*, p. 451, para. 74.

[1202] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI.

[1203] "Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'", study by the Secretariat (A/CN.4/630).

[1204] *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D (art. 9); see also Commission on Human Rights resolution 2005/81 on impunity (footnote 1100 above), para. 2 (recognizing "that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as … crimes against humanity … in accordance with their international obligations in order to bring them to justice, and urg[ing] all States to take effective measures to implement these obligations").

[1205] See Organization of American States (OAS), Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (Washington, D.C., 2 February 1971), United Nations, *Treaty Series*, vol. 1438, No. 24371, p. 195, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977), *ibid.*, vol. 1490, No. 25573, p. 89, arts. 8-9, paras. 2-3; European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977), *ibid.*, vol. 1137, No.

Seizure of Aircraft.[1206] Under that formula, the obligation arises whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. Although regularly termed the obligation to extradite or "prosecute", the obligation is to "submit the case to its competent authorities for the purpose of prosecution", meaning to submit the matter to prosecutorial authorities, which may or may not decide to prosecute. In particular, if the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment.[1207] The *travaux préparatoires* of the Convention for the Suppression of Unlawful Seizure of Aircraft indicate that the formula established "the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution".[1208]

(4) In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice analysed The Hague formula in the context of article 7 of the Convention against Torture:

> "90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the 'obligation to prosecute') was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious

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17828, p. 93, art. 7; Inter-American Convention to Prevent and Punish Torture, art. 14; SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism (Kathmandu, 4 November 1987), in *International Instruments related to the Prevention and Suppression of* ... (see footnote 1058 above), p. 174, at art. IV, p. 176; Inter-American Convention on Forced Disappearance of Persons, art. 6; Inter-American Convention on International Traffic in Minors (Mexico, 18 March 1994), OAS, *Treaty Series*, No. 79, art. 9; Inter-American Convention against Corruption (Caracas, 29 March 1996), art. 13, para. 6; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (Washington, D.C., 14 November 1997), art. 19, para. 6; League of Arab States, Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998), in *International Instruments related to the Prevention and Suppression of* ... (see footnote 1058 above), p. 178, at art. 6, p. 183; Council of Europe, Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), *European Treaty Series*, No. 173, art. 27, para. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1 July 1999), annex to resolution 59/26-P, available from www.oic-oci.org/english/convenion/terrorism_convention.htm, art. 6; Council of Europe, Convention on Cybercrime (Budapest, 23 November 2001), *European Treaty Series*, No. 185, art. 24, para. 6; African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), available from www.au.int/en/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf, art. 15, para. 6; Council of Europe, Convention on the Prevention of Terrorism (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 196, art. 18; Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 197, art. 31, para. 3; and ASEAN Convention on Counter Terrorism (see footnote 1058 above), art. XIII, para. 1.

[1206] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 7.

[1207] See A/CN.4/630 (footnote 1203 above), pp. 74-75.

[1208] Statement of Chairperson Gilbert Guillaume (delegate from France), International Civil Aviation Organization, *Legal Committee, Seventeenth Session, Montreal, 9 February-11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Montreal, 1970), 30th meeting (3 March 1970) (Doc. 8877-LC/161), para. 15.

nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

"91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven …

…

"94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

"95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

…

"114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

"115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is 'to make more effective the struggle against torture' (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

…

"120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him."[1209]

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;[1210] referral of the matter to a regional organization;[1211] or difficulties with implementation under the State's internal law.[1212]

(6) The first sentence of draft article 9 recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender not just to a State, but also to an international criminal tribunal that is competent to prosecute the offender. This third option has arisen in conjunction with the establishment of the International Criminal Court and other international criminal tribunals.[1213] While the term "extradition" is often associated with the sending of a person to a State and the term "surrender" is typically used for the sending of a person to a competent international criminal tribunal, draft article 9 is written so as not to limit the use of the terms in that way. The terminology used in national criminal systems and in international relations can vary[1214] and, for that reason, the Commission considered that a more general formulation is preferable. Further, while draft article 9 might condition the reference to an international criminal tribunal so as to say that it must be a tribunal whose jurisdiction the sending State has recognized,[1215] such a qualification was viewed as unnecessary.

(7) The second sentence of draft article 9 provides that, when a State submits the matter to prosecution or extradites or surrenders the person, its "authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State". Most treaties containing The Hague formula include such a clause, the objective of which is to help ensure that the normal procedures and standards of evidence relating to serious offences are applied.

Article 10
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

[1209] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 1175 above), pp. 454-461, paras. 90-91, 94-95, 114-115 and 120.

[1210] *Ibid.* p. 460, para. 112.

[1211] *Ibid.*

[1212] *Ibid.* p. 460, para. 113.

[1213] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI, sect. C (Final report on the topic), para. (35), pp. 155-156.

[1214] See, for example, European Union, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, L 190, 18 July 2002, p. 1, available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:en:HTML. Article 1 of the framework decision provides: "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and *surrender* by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (emphasis added).

[1215] See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Commentary

(1) Draft article 10 is focused on the obligation of the State to accord to an alleged offender who is present in territory under the State's jurisdiction fair treatment, including a fair trial and full protection of his or her rights. Moreover, draft article 10 acknowledges the right of an alleged offender, who is not of the State's nationality but who is in prison, custody or detention, to have access to a representative of his or her State.

(2) All States provide within their national law for protections of one degree or another for persons who they investigate, detain, try or punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial precedent. Further, detailed rules may be codified or a broad standard may be set referring to "fair treatment", "due process", "judicial guarantees" or "equal protection". Such protections are extremely important in ensuring that the extraordinary power of the State's criminal justice apparatus is not improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State's allegations before an independent court (hence, allowing for an "equality of arms").

(3) Important protections are also now well recognized in international criminal law and human rights law. At the most general level such protections are acknowledged in articles 10 and 11 of the 1948 Universal Declaration of Human Rights,[1216] while more specific standards binding upon States are set forth in article 14 of the International Covenant on Civil and Political Rights. As a general matter, instruments establishing standards for an international court or tribunal seek to specify the standards set forth in article 14 of the Covenant, while treaties addressing national law provide a broad standard that is intended to acknowledge and incorporate the specific standards of article 14 and of other relevant instruments "at all stages" of the national proceedings involving the alleged offender.[1217]

[1216] *Universal Declaration of Human Rights*, General Assembly resolution 217 A (III) of 10 December 1948, arts. 10-11.

[1217] See, for example, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 9; International Convention Against the Taking of Hostages, art. 8, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, para. 3; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 10, para. 2; Convention on the Rights of the Child (New York, 20 November 1989), *ibid.*, vol. 1577, No. 27531, p. 3, art. 40, para. 2 (b); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989), *ibid.*, vol.

(4) These treaties addressing national law do not define the term "fair treatment", but the term is viewed as incorporating the specific rights possessed by an alleged offender, such as those under article 14 of the International Covenant on Civil and Political Rights. Thus, when crafting article 8 of the draft articles on crimes against diplomatic agents, the Commission asserted that the formulation of "fair treatment at all stages of the proceedings" was "intended to incorporate all the guarantees generally recognized to a detained or accused person", and that an "example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights".[1218] Further, the Commission noted that the "expression 'fair treatment' was preferred, because of its generality, to more usual expressions such as 'due process', 'fair hearing' or 'fair trial' which might be interpreted in a narrow technical sense".[1219] Finally, the Commission also explained that the formulation of "all stages of the proceedings" is "intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case".[1220]

(5) While the term "fair treatment" includes the concept of a "fair trial", in many treaties reference to a fair trial is expressly included to stress its particular importance. Indeed, the Human Rights Committee has found the right to a fair trial to be a "key element of human rights protection" and a "procedural means to safeguard the rule of law".[1221] Consequently, draft article 10, paragraph 1, refers to fair treatment "including a fair trial".

(6) In addition to fair treatment, an alleged offender is also entitled to the highest protection of his or her rights, whether arising under applicable national or international law, including human rights law. Such rights are set forth in the constitutions, statutes or other rules within the national legal systems of States. At the international level, they are set out in global human rights treaties, in regional human rights treaties[1222] or in other applicable instruments.[1223] Consequently, draft article 10, paragraph 1, also recognizes that

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2163, No. 37789, p. 75, art. 11; International Convention for the Suppression of Terrorist Bombings, art. 14; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999), United Nations, *Treaty Series*, vol. 2253, No. 3511, art. 17, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 17; United Nations Convention against Transnational Organized Crime, art. 16, para. 13; United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41, art. 44, para. 14; International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005), *ibid.*, vol. 2445, No. 44004, p. 89, art. 12; International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. 8, para. 1.

[1218] *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), commentary to art. 8, p. 320.

[1219] *Ibid.*

[1220] *Ibid.*

[1221] Human Rights Committee, general comment No. 32 (2007), art. 14 (Right to equality before courts and tribunals and to a fair trial), *Official Records of the General Assembly, Sixty-second session, Supplement No. 40* (A/62/40), annex VI, para. 2; see also paras. 18-28.

[1222] See, for example, American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 8; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid.*, vol. 1520, No. 26363, p. 217, art. 7; Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221, art. 6.

[1223] See, for example, Universal Declaration of Human Rights (footnote 1216 above); American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948), adopted by the Ninth International Conference of American States (available from www.oas.org/dil/

the State must provide full protection of the offender's "rights under applicable national and international law, including human rights law".

(7) Paragraph 2 of draft article 10 addresses the State's obligations with respect to an alleged offender who is not of the State's nationality and who is in "prison, custody or detention". That term is to be understood as embracing all situations where the State restricts the person's ability to communicate freely with and be visited by a representative of his or her State of nationality. In such situations, the State in the territory under whose jurisdiction the alleged offender is present is required to allow the alleged offender to communicate, without delay, with the nearest appropriate representative of the State or States of which such a person is a national, or the State or States otherwise entitled to protect that person's rights. Further, the alleged offender is entitled to be visited by a representative of that State or those States. Finally, the alleged offender is entitled to be informed without delay of these rights. Moreover, paragraph 2 applies these rights as well to a stateless person, requiring that such person be entitled to communicate without delay with the nearest appropriate representative of the State which, at that person's request, is willing to protect that person's rights and to be visited by that representative.

(8) Such rights are spelled out in greater detail in article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations,[1224] which accords rights to both the detained person and to the State of nationality[1225] and in customary international law. Recent treaties addressing crimes typically do not seek to go into such detail but, like draft article 10, paragraph 2, instead simply reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights).[1226]

(9) Paragraph 3 of draft article 10 provides that the rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended. Those national laws and regulations may relate, for example, to the ability of an investigating magistrate to impose restrictions on communication for the protection of victims or

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1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf); Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation Resolution No. 49/19-P, annex, available from www.oic-oci.org/english/article/human.htm; Charter of the Fundamental Rights of the European Union, *Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1.

[1224] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 36, para. 1.

[1225] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 492, para. 74 ("Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection"), and, at p. 494, para. 77 ("Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights").

[1226] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 6, para. 3; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 6, para. 2; International Convention Against the Taking of Hostages, art. 6, para. 3; Convention against Torture, art. 6, para. 3; Convention on the Safety of United Nations and Associated Personnel, art. 17, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 3; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 3; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 4.

witnesses, as well as standard conditions with respect to visitation of a person being held at a detention facility. A comparable provision exists in article 36, paragraph 2, of the Vienna Convention on Consular Relations[1227] and has been included as well in many treaties addressing crimes.[1228] The Commission explained the provision in its commentary to what became the Vienna Convention as follows:

> "(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.
>
> …
>
> "(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question."[1229]

(10) In the *LaGrand* case, the International Court of Justice found that the reference to "rights" in article 36, paragraph 2, of the Vienna Convention "must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual".[1230]

[1227] Vienna Convention on Consular Relations, at art. 36, para. 2.

[1228] See, for example, International Convention Against the Taking of Hostages, art. 4; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 4; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 4; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 4; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 5.

[1229] *Yearbook … 1961*, vol. II, document A/4843, draft articles on consular relations and commentary, commentary to art. 36, paras. (5) and (7).

[1230] *LaGrand* (see footnote 1225 above), p. 497, para. 89.

Chapter VIII
Protection of the atmosphere

A. Introduction

86. The Commission, at its sixty-fifth session (2013), decided to include the topic "Protection of the atmosphere" in its programme of work, subject to an understanding, and appointed Mr. Shinya Murase as Special Rapporteur.[1231]

87. The Commission received and considered the first report of the Special Rapporteur at its sixty-sixth session (2014)[1232] and the second report at its sixty-seventh session (2015).[1233] On the basis of the draft guidelines proposed by the Special Rapporteur in the second report, the Commission provisionally adopted three draft guidelines and four preambular paragraphs, together with commentaries thereto.[1234]

B. Consideration of the topic at the present session

88. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/692). The Special Rapporteur, building on the previous two reports, analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. He also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. Accordingly, the Special Rapporteur proposed draft guidelines on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere and geo-engineering. He also proposed an additional preambular paragraph, to be the fourth preambular paragraph, and the renumbering of the

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[1231] At its 3197th meeting, on 9 August 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10)), para. 168. The Commission included the topic in its programme of work on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding." The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 365).

[1232] First report on the protection of the atmosphere (A/CN.4/667).

[1233] Second report on the protection of the atmosphere (A/CN.4/681).

[1234] Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/70/10), paras. 53-54.

draft guideline on international cooperation provisionally adopted by the Commission in 2015.

89. The Special Rapporteur indicated that in 2017 the Commission could deal with the question of the interrelationship of the law of the atmosphere with other fields of international law (such as the law of the sea, international trade and investment law and international human rights law), and in 2018 with the issues of implementation, compliance and dispute settlement relevant to the protection of the atmosphere, with the intention of completing the first reading of the topic that year.

90. The Commission considered the third report of the Special Rapporteur at its 3306th, 3307th, 3308th, and 3311th meetings, on 27 and 31 May, and 1 and 7 June 2016.

91. The debate in the Commission was preceded by a dialogue with scientists organized by the Special Rapporteur on 4 May 2016.[1235] Members of the Commission found the dialogue and the contributions made useful.

92. Following its debate on the report, the Commission, at its 3311th meeting, on 7 June 2016, decided to refer draft guidelines 3, 4, 5, 6 and 7, together with the fourth preambular paragraph, as contained in the Special Rapporteur's third report, to the Drafting Committee.

93. At its 3314th meeting, on 4 July 2016, the Commission received the report of the Drafting Committee. At its 3315th meeting, on 5 July 2016, the Commission considered and provisionally adopted five draft guidelines and a preambular paragraph (see section C.1, below).

94. At its 3341st to 3343rd meetings, on 9 and 10 August 2016, the Commission adopted the commentaries to the draft guidelines provisionally adopted at the present session (see section C.2, below).

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission

1. Text of the draft guidelines, together with preambular paragraphs

95. The text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission is reproduced below.

Preamble

...

[1235] The dialogue with scientists on the protection of the atmosphere was chaired by Mr. Shinya Murase, Special Rapporteur. Mr. Øystein Hov, President of the Commission for Atmospheric Sciences, World Meteorological Organization (WMO), addressed "Geoengineering — a way forward?"; Mr. Peringe Grennfelt, Chairperson of the Working Group on Effects, Convention on Long-Range Transboundary Air Pollution, Economic Commission for Europe, considered "Linkages between transboundary air pollution and climate change"; Mr. Christian Blondin, Head of Cabinet of the Secretary-General and Director of the External Relations Department, WMO, analysed the "Scientific aspects of the 2015 Paris Agreement"; Mr. Valentin Foltescu, Head of the Thematic Assessments Unit in the Division of Early Warning and Assessments, United Nations Environment Programme (UNEP), presented "An overview of the latest findings and estimates of the effects of air pollution"; Mr. Masa Nagai, Deputy Director of the Division of Environmental Law and Conventions, UNEP, discussed "Linking science with law". The dialogue was followed by a question and answer session. The summary of the informal dialogue is available on the website of the Commission.

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Aware of the special situation and needs of developing countries,

Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

[Some other paragraphs may be added and the order of paragraphs may be coordinated at a later stage.]

...

Guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2[1236]
Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

[1236] The alternative formulations in brackets will be subject to further consideration.

Guideline 3
Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Guideline 4
Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5
Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6
Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Guideline 7
Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Guideline 8 [5][1237]
International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

2. Text of the draft guidelines, together with a preambular paragraph, and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

96. The text of the draft guidelines, together with a preambular paragraph, and commentaries thereto, provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

[1237] The draft guideline has been renumbered at the current session. The original number appears in square brackets.

Preamble

Aware of the special situation and needs of developing countries,

Commentary

(1) The fourth preambular paragraph has been inserted having regard to considerations of equity, and concerns the special situation and needs of developing countries . One of the first attempts to incorporate such a principle was the Washington Conference of the International Labour Organization in 1919, at which delegations from Asia and Africa succeeded in ensuring the adoption of differential labour standards.[1238] Another example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s, as reflected in draft article 23 of the Commission's 1978 draft articles on most-favoured-nation clauses.[1239]

(2) The need for special consideration for developing countries in the context of environmental protection has been endorsed by a number of international instruments, such as the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (hereinafter, "Stockholm Declaration"),[1240] and the 1992 Rio Declaration on Environment and Development (hereinafter, "Rio Declaration").[1241] Principle 12 of the Stockholm Declaration attaches importance to "taking into account the circumstances and particular requirements of developing countries". Principle 6 of the Rio Declaration highlights "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable". The principle is similarly reflected in article 3 of the 1992 United Nations Framework Convention on Climate Change[1242] and article 2 of the 2015 Paris Agreement.[1243]

[1238] On the basis of art. 405, para. 3, of the 1919 Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919), which became art. 19, para. 3, of the International Labour Organization Constitution (9 October 1946, United Nations, *Treaty Series*, vol. 15, No. 229, p. 35) (labour conventions "shall have due regard" to the special circumstances of countries where local industrial conditions are "substantially different"). The same principle also appeared in some of the conventions approved by the Organization in 1919 and in several conventions adopted afterwards. See I.F. Ayusawa, *International Labor Legislation* (New York, Columbia University, 1920), chap. VI, pp. 149 *et seq*.

[1239] See art. 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences) and art. 30 (New rules of international law in favour of developing countries) of the draft articles on the most-favoured-nation clauses adopted by the Commission at its thirtieth session in 1978, *Yearbook ... 1978*, vol. II (Part Two), paras. 74, see also paras. 47-72. S. Murase, *Economic Basis of International Law* (Tokyo, Yuhikaku, 2001), pp. 109-179 (in Japanese). And see the earlier exceptions for developing countries specified in art. XVIII of the 1947 General Agreement on Tariffs and Trade, United Nations, *Treaty Series*, vol. 55, No. 814, p. 194.

[1240] Adopted at Stockholm on 16 June 1972, see *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (A/CONF.48/14/Rev.1 and Corr.1), part one, chap. I. See L. B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal*, vol. 14 (1973), pp. 423-515, at pp. 485-493.

[1241] Adopted at Rio de Janeiro on 14 June 1992, see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (vol. I) and Corr.1), resolution I, p. 3.

[1242] United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.

[1243] Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015 (FCCC/CP/2015/10/Add.1), annex.

(3) The formulation of the present preambular paragraph is based on the seventh paragraph of the preamble of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.[1244]

Guideline 3
Obligation to protect the atmosphere

> **States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.**

Commentary

(1) Draft guideline 3 is central to the present draft guidelines. In particular, draft guidelines 4, 5 and 6, below, flow from this guideline; these three draft guidelines seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere.

(2) The draft guideline seeks to delimit the obligation to protect the atmosphere to preventing, reducing and controlling atmospheric pollution and atmospheric degradation, thus differentiating the kinds of obligations pertaining to each. The formulation of the present draft guideline finds its genesis in principle 21 of the Stockholm Declaration, which reflected the finding in the *Trail Smelter* arbitration.[1245] This is further reflected in principle 2 of the 1992 Rio Declaration.

(3) The reference to "States" for the purposes of the draft guideline denotes both the possibility of States acting "individually" and "jointly" as appropriate. The draft guideline refers to both the transboundary and global contexts. It will be recalled that draft guideline 1 provisionally adopted in 2015 contains a "transboundary" element in defining "atmospheric pollution" (as the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects "extending beyond the State of origin", of such a nature as to endanger human life and health and the Earth's natural environment), and a "global" dimension in defining "atmospheric degradation" (as the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment).

(4) As presently formulated, the draft guideline is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts,[1246] a matter on

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[1244] Adopted by the General Assembly in resolution 51/229 (annex) on 21 May 1997. The Convention entered into force on 17 August 2014.

[1245] See United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905-1982 (Award of 11 March 1941), at p. 1965 *et seq.*; and the first report of the Special Rapporteur (A/CN.4/667), para. 43. See also A. K. Kuhn, "The Trail Smelter Arbitration, United States and Canada", *American Journal of International Law*, vol. 32 (1938), pp. 785-788 and *ibid.*, vol. 35 (1941), pp. 665-666; and J. E. Read, "The Trail Smelter Dispute", *Canadian Yearbook of International Law*, vol. 1 (1963), pp. 213-229.

[1246] Article 48 (Invocation of responsibility by a State other than an injured State) provides that "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if … (*b*) the obligation breached is owed to the international community as a whole" (General Assembly resolution 56/83 of 12 December 2001. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook … 2001*, vol. II (Part Two), and corrigendum, chap. IV, sect. E).

which there are different views. While there is support for recognizing that the obligations pertaining to the protection of the atmosphere from transboundary atmospheric pollution of global significance and global atmospheric degradation are obligations *erga omnes*, there is also support for the view that the legal consequences of such a recognition are not yet fully clear in the context of the present topic.

(5) Significant adverse effects on the atmosphere are caused, in large part, by the activities of individuals and private industries, which are not normally attributable to a State. In this respect, due diligence requires States to "ensure" that such activities within their jurisdiction or control do not cause significant adverse effects. This does not mean, however, that due diligence applies solely to private activities since a State's own activities are also subject to the due diligence rule.[1247] Due diligence is an obligation to make best possible efforts in accordance with the capabilities of the State controlling the activities. Therefore, even where significant adverse effects materialize, that does not automatically constitute a failure of due diligence. Such failure is limited to the State's negligence to meet its obligation to take all appropriate measures to prevent, reduce or control human activities where these activities have or are likely to have significant adverse effects. The States' obligation "to ensure" does not require the achievement of a certain result (obligation of result) but only requires the best available efforts so as not to cause significant adverse effects (obligation of conduct). It requires States to take appropriate measures to control public and private conduct. Due diligence implies a duty of vigilance and prevention. It also requires taking into account the context and evolving standards, of both regulation and technology.

(6) The reference to "prevent, reduce or control" denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules as may be relevant to atmospheric pollution on the one hand and atmospheric degradation on the other. The phrase "prevent, reduce or control" draws upon formulations contained in the United Nations Convention on the Law of the Sea[1248] and the United Nations Framework Convention on Climate Change.[1249]

(7) Even though the appropriate measures to "prevent, reduce or control" apply to both atmospheric pollution and atmospheric degradation, it is understood that the reference to "applicable rules of international law" is intended to signal a distinction between measures taken, bearing in mind the transboundary nature of atmospheric pollution and global nature of atmospheric degradation and the different rules that are applicable in relation thereto. In the context of transboundary atmospheric pollution, the obligation of States to prevent significant adverse effect is firmly established as customary international law, as confirmed, for example, by the Commission's articles on prevention of transboundary harm from hazardous activities[1250] and by the jurisprudence of international courts and tribunals.[1251]

[1247] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 55, para. 101 ("… the principle of prevention, as a customary rule, has its origins in the due diligence …").

[1248] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 194.

[1249] United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107, art. 4.

[1250] *Yearbook … 2001*, vol. II (Part Two), chap. V, sect. E, art. 3 (Prevention): "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." The Commission has also dealt with the obligation of prevention in its articles on responsibility of States for internationally wrongful acts. Art. 14, para. 3, provides that "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues …" (*ibid.*, chap. IV, sect. E).

However, the existence of this obligation is still somewhat unsettled for global atmospheric degradation. The International Court of Justice has stated that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment … of areas beyond national control is now part of the corpus of international law",[1252] and has attached great significance to respect for the environment "not only for States but also for the whole of mankind".[1253] The Tribunal in the *Iron Rhine Railway* case stated that the "duty to prevent, or at least mitigate [significant harm to the environment] … has now become a principle of general international law".[1254] At the same time, the views of members diverged as to whether these pronouncements may be deemed as fully supporting the recognition that the obligation to prevent, reduce, or control global atmospheric degradation exists under customary international law. Nonetheless, such an obligation is found in relevant conventions.[1255] In this context, it should be noted that the Paris Agreement, "acknowledging in the Preamble that "climate change is a common concern of humankind", states "the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity …".[1256]

Guideline 4
Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are

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According to the commentary: "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur" (*ibid.*, para. (14) of the commentary to art. 14, para. 3). The commentary illustrated "the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration [United Nations, *Reports of International Arbitral Awards*, vol. III (sales No. 1949.V.2), pp. 1905-1982]" as one of the examples of the obligation of prevention (*ibid.*).

[1251] The International Court of Justice has emphasized prevention as well. In the *Gabčíkovo-Nagymaros Project* case, the Court stated that it "is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140). In the *Iron Rhine Railway* case, the Arbitral Tribunal also stated that "[t]oday, in international environmental law, a growing emphasis is being put on the duty of prevention" (*Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, *UNRIAA*, vol. XXVII, pp. 35-125, at p. 116, para. 222).

[1252] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 241-242, para. 29.

[1253] *Gabčíkovo-Nagymaros Project* (see footnote 1251 above), p. 41, para. 53; the Court cited the same paragraph in *Pulp Mills on the River Uruguay* (see footnote 1247 above), p. 78, para. 193.

[1254] *Iron Rhine Railway* (see footnote 1251 above), pp. 66-67, para. 59.

[1255] See, for example, United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), *ibid.*, vol. 1513, No. 26164, p. 293, United Nations Framework Convention on Climate Change (New York, 9 May 1992), ibid., vol. 1771, No. 30822, p. 107, Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), *ibid.*, vol. 1760, No. 30619, p. 79, United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994), *ibid.*, vol. 1954, No. 33480, p. 3, Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), *ibid.*, vol. 2256, No. 40214, p. 119, and Minamata Convention on Mercury (Kumamoto, 10 October 2013), Available from https://treaties.un.org (Status of Multilateral Treaties Deposited with the Secretary general, chap. XVII.17).

[1256] Art. 2, para. 1.

likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Commentary

(1) Draft guideline 4 deals with environmental impact assessment. This is the first of three draft guidelines that flow from the overarching draft guideline 3. In the *Construction of a Road in Costa Rica along the San Juan River* case, the International Court of Justice affirmed that "a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment".[1257] In the above-mentioned case, the Court concluded that the State in question "ha[d] not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road". [1258] In a separate opinion, Judge Owada noted that "an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law".[1259] Two other judgments, in the cases regarding the *Gabčíkovo-Nagymaros Project*[1260] and the *Pulp Mills on the River Uruguay*,[1261] alluded to the importance of an environmental impact assessment. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea rendered its Advisory Opinion on the *Responsibilities and obligations of States regarding activities in the Area* in 2011, in which the Chamber listed the obligation to conduct an environmental impact assessment as one of the direct obligations incumbent on sponsoring States. [1262]

(2) The draft guideline is formulated in the passive tense — "States have the obligation to ensure that an environmental impact assessment is undertaken" as opposed to "States have an obligation to undertake an appropriate environmental impact assessment" — in order to signal that this is an obligation of conduct and given the broad nature of economic actors the obligation does not necessarily attach to the State itself to perform the assessment. What is required is that the State put in place the necessary legislative, regulatory and other measures for an environmental impact assessment to be conducted with respect to proposed activities. Notification and consultations are key to such an assessment.

(3) The phrase "of proposed activities under their jurisdiction or control" is intended to indicate that the obligation of States to ensure that an environment impact assessment is undertaken is in respect of activities under their jurisdiction or control. Since environmental threats have no respect for borders, it is not precluded that States, as part of their global environmental responsibility, take decisions jointly regarding environmental impact assessments.

(4) A threshold was considered necessary for triggering the environmental impact assessment. The phrase "which are likely to cause significant adverse impact" has accordingly been inserted. It is drawn from the language of principle 17 of the Rio

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[1257] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, para. 153.

[1258] *Ibid.*, para. 168.

[1259] *Ibid.*, Separate Opinion of Judge Owada, para. 18.

[1260] *Gabčíkovo-Nagymaros Project* (see footnote 1251 above).

[1261] *Pulp Mills on the River Uruguay* (see footnote 1247 above).

[1262] The International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Dispute Chamber)*, advisory opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at paras. 122 and 141-150.

Declaration. Moreover, there are other instruments, such as the Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[1263] that use a similar threshold. In the *Pulp Mills* case, the Court indicated that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[1264]

(5) By having a threshold of "likely to cause significant adverse impact", the draft guideline excludes an environmental impact assessment for an activity whose impact is likely to be minor. The impact of the potential harm must be "significant" for both "atmospheric pollution" and "atmospheric degradation". What constitutes "significant" requires a factual determination.[1265]

(6) The phrase "in terms of atmospheric pollution or atmospheric degradation" was considered important as it relates the draft guideline to the two main issues of concern to the present draft guidelines as regards protection of the environment, namely transboundary atmospheric pollution and atmospheric degradation. While the relevant precedents for the requirement of an environmental impact assessment primarily address transboundary contexts, it is considered that there is a similar requirement for projects that are likely to have significant adverse effects on the global atmosphere, such as those activities involving intentional large-scale modification of the atmosphere.[1266] As regards the protection of the atmosphere, such activities may carry a more extensive risk of severe damage than even those causing transboundary harm, and therefore the same considerations should be applied *a fortiori* to those activities potentially causing global atmospheric degradation. Thus, the Kiev Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context encourages "strategic environmental assessment" of the likely environmental, including health, effects, which means any effect on the environment, including human health, flora, fauna, biodiversity, soil, climate, air, water, landscape, natural sites, material assets, cultural heritage and the interaction among these factors.[1267]

(7) While it is acknowledged that transparency and public participation are important components in ensuring access to information and representation, it was considered that the parts dealing with procedural aspects of an environmental impact assessment should not be dealt with in the draft guideline itself. Principle 10 of the 1992 Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. This includes access to information, the opportunity to participate in decision-making processes, and effective access to judicial and administrative proceedings.

[1263] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

[1264] *Pulp Mills on the River Uruguay* (see footnote 1247 above), p. 83, para. 204.

[1265] The Commission has frequently employed the term "significant" in its work, including in the articles on the prevention of transboundary harm from hazardous activities (2001). In that case, the Commission chose not to define the term, recognizing that the question of "significance" requires a factual determination rather than a legal one (see the general commentary, para. (4), *Yearbook … 2001*, vol. II (Part Two), chap. V, sect. E). See, for example, paras. (4) and (7) of the commentary to art. 2 of the articles on the prevention of transboundary harm from hazardous activities (*ibid.*). See also the commentary to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (commentary to draft principle 2, paras. (1)-(3), *Yearbook* … 2006, vol. II (Part Two), chap. V, sect. E).

[1266] See draft guideline 7.

[1267] Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context (Kiev, 21 may 2003), doc. ECE/MP.EIA/2003/2 (available from: www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish), art. 2, paras. 6-7.

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[1268] also addresses these issues. The Kiev Protocol on Strategic Environmental Assessment encourages the carrying out of public participation and consultations, and the taking into account of the results of the public participation and consultations in a plan or programme.[1269]

Guideline 5
Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Commentary

(1) The atmosphere is a natural resource with limited assimilation capacity.[1270] It is often not conceived of as exploitable in the same sense as, for example, mineral or oil and gas resources are explored and exploited. In truth, however, the atmosphere, in its physical and functional components, is exploitable and exploited. The polluter exploits the atmosphere by reducing its quality and its capacity to assimilate pollutants. The draft guideline draws analogies from the concept of "shared resource", while also recognizing that the unity of the global atmosphere requires recognition of the commonality of interests. Accordingly, this draft guideline proceeds on the premise that the atmosphere is a resource with limited assimilation capacity, the ability of which to sustain life on Earth is impacted by anthropogenic activities. In order to secure its protection, it is important to see it as a resource that is subject to exploitation, thereby subjecting the atmosphere to the principles of conservation and sustainable use. Some members expressed doubts whether the atmosphere could be treated analogously as transboundary watercourses or aquifers.

(2) It is acknowledged in paragraph 1 that the atmosphere is a "natural resource with a limited assimilation capacity". The second part of paragraph 1 seeks to integrate conservation and development so as to ensure that modifications to the planet continue to enable the survival and wellbeing of organisms on Earth. It does so by reference to the proposition that the utilization of the atmosphere should be undertaken in a sustainable manner. This is inspired by the Commission's formulations as reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses,[1271] and the law of transboundary aquifers.[1272]

(3) The term "utilization" is used broadly and in general terms evoking notions beyond actual exploitation. The atmosphere has been utilized in several ways. Likely, most of these activities that have been carried out so far are those conducted without a clear or concrete

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[1268] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 28 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.

[1269] Art. 2, paras. 6-7.

[1270] See para. (2) of the commentary to the preamble of the draft guidelines on the protection of the atmosphere provisionally adopted by the Commission at its sixty-seventh session in 2015, *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. V, sect. C.

[1271] Arts. 5 and 6. For the draft articles and commentaries thereto adopted by the Commission, see *Yearbook ... 1994*, vol. II (Part Two), chap. III, sect. E.

[1272] General Assembly resolution 63/124 of 11 December 2008, annex, arts. 4-5. For the draft articles and commentaries thereto adopted by the Commission, see *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

intention to affect atmospheric conditions. However, there have been certain activities the very purpose of which is to alter atmospheric conditions, such as weather modification. Some of the proposed technologies for intentional, large-scale modification of the atmosphere[1273] are examples of the utilization of the atmosphere.

(4) The formulation "its utilization should be undertaken in a sustainable manner" in the present draft guideline is simple and not overly legalistic, which well reflects a paradigmatic shift towards viewing the atmosphere as a natural resource that ought to be utilized in a sustainable manner. It is presented more as a statement of international policy and regulation than an operational code to determine rights and obligations among States.

(5) Paragraph 2 builds upon the language of the International Court of Justice in its judgment in the *Gabčíkovo-Nagymaros Project* case, in which it referred to the "need to reconcile environmental protection and economic development".[1274] The Commission also noted other relevant precedents.[1275] The reference to "protection of the atmosphere" as opposed to "environmental protection" seeks to focus the paragraph on the subject matter of the present topic, which is the protection of the atmosphere.

Guideline 6
Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

[1273] See draft guideline 7 below.

[1274] *Gabčíkovo-Nagymaros Project* (see footnote 1251 above), p. 78, para. 140.

[1275] In the 2006 order of the *Pulp Mills* case, the International Court of Justice highlighted "the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development" (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, *I.C.J. Reports 2006*, p. 113, at p. 133, para. 80); the 1998 WTO Appellate Body decision on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* stated that, "recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living resources" (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 131, see also paras. 129 and 153); in the 2005 arbitral case of the *Iron Rhine Railway*, the Tribunal held as follows: "[t]here is considerable debate as to what, within the field of environmental law, constitutes 'rules' or 'principles': what is 'soft' law; and which environmental treaty law or principles have contributed to the development of customary international law. … The emerging principles, whatever their current status, make reference to … sustainable development. … Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause signify harm to the environment there is a duty to prevent, or at least mitigate such harm. … This duty, in the opinion of the Tribunal, has now become a principle of general international law", *Iron Rhine Railway* (see footnote 1251 above), paras. 58-59; the 2013 Partial Award of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* states: "[t]here is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State. Since the time of *Trail Smelter*, a series of international … arbitral decisions have addressed the need to manage natural resources in a sustainable manner. In particular, the International Court of Justice expounded upon the principle of 'sustainable development' in *Gabčíkovo-Nagymaros*, referring to the 'need to reconcile economic development with protection of the environment'" (Permanent Court of Arbitration Award Series, *Indus Waters Kishenganga Arbitration (Pakistan v. India): Record of Proceedings 2010-2013*, Partial Award of 18 February 2013, para. 449. This was confirmed by the Final Award of 20 December 2013, para. 111.

Commentary

(1) Although equitable and reasonable utilization of the atmosphere is an important element of sustainability, as reflected in draft guideline 5, it is considered important to state it as an autonomous principle. Like draft guideline 5, the present guideline is formulated at a broad level of abstraction and generality.

(2) The draft guideline is formulated in general terms so as to apply the principle of equity[1276] to the protection of the atmosphere as a natural resource that is to be shared by all. The first part of the sentence deals with "equitable and reasonable" utilization. The formulation that the "atmosphere should be utilized in an equitable and reasonable manner" draws, in part, upon article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and article 4 of the law of transboundary aquifers. It requires a balancing of interests and consideration of all relevant factors that may be unique to either atmospheric pollution or atmospheric degradation.

(3) The second part of the formulation addresses questions of intra- and intergenerational equity.[1277] In order to draw out the link between the two aspects of equity, the Commission elected to use the phrase "taking into account the interests of future" instead of "and for the benefit of present and future generations of humankind". The words "the interests of", and not "the benefit of", have been used to signal the integrated nature of the atmosphere, the "exploitation" of which needs to take into account a balancing of interests to ensure sustenance for the Earth's living organisms.

Guideline 7
Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Commentary

(1) Draft guideline 7 deals with activities the very purpose of which is to alter atmospheric conditions. As the title of the draft guideline signals, it addresses only intentional modification on a large scale.

(2) The term "activities aimed at intentional large-scale modification of the atmosphere" is taken in part from the definition of "environmental modification techniques" that appears in the Convention on the Prohibition of Military or any Hostile Use of Environmental

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[1276] See, for example, J. Kokott, "Equity in international law", in *Fair Weather? Equity Concerns in Climate Change*, F.L. Toth, ed. (Abingdon and New York, Routledge, 2014), pp. 173-192; *Frontier Dispute (Burkina Faso v. Mali), Judgment, I.C.J Reports 1986*, p. 554; See, in general, P. Weil, "L'équité dans la jurisprudence de la Cour internationale de Justice: Un mystère en voie de dissipation?", in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, V. Lowe and M. Fitzmaurice, eds. (Cambridge, United Kingdom, Cambridge University Press, 1996), pp. 121-144; F. Francioni, "Equity in international law," in *Max Plank Encyclopedia of Public International Law*, vol. III, R. Wolfrum, ed. (Oxford, Oxford University Press, 2013), pp. 632-642.

[1277] C. Redgwell, , "Principles and emerging norms in international law: Intra- and Inter-generational equity," *in* Cinnamon P. Carlarne, et al., eds., *The Oxford Handbook on International Climate Change Law* (Oxford: Oxford University Press, 2016), pp. 185-201.; D. Shelton, "Equity" in D. Bodansky, et al., *Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008), pp. 639-662.

Modification Techniques,[1278] which refers to techniques for changing — through the deliberate manipulation of natural processes — the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

(3) These activities include what is commonly understood as "geo-engineering", the methods and technologies of which encompass carbon dioxide removal and solar radiation management. Activities related to the former involve the ocean, land and technical systems and seek to remove carbon dioxide from the atmosphere through natural sinks or through chemical engineering. Proposed techniques for carbon dioxide removal include: soil carbon sequestration; carbon capture and sequestration; ambient air capture; ocean fertilization; ocean alkalinity enhancement; and enhanced weathering. Indeed, afforestation has traditionally been employed to reduce carbon dioxide.

(4) According to scientific experts, solar radiation management is designed to mitigate the negative impacts of climate change by intentionally lowering the surface temperatures of the Earth. Proposed activities here include: "albedo enhancement", a method that involves increasing the reflectiveness of clouds or the surface of the Earth, so that more of the heat of the sun is reflected back into space; stratospheric aerosols, a technique that involves the introduction of small, reflective particles into the upper atmosphere to reflect sunlight before it reaches the surface of the Earth; and space reflectors, which entail blocking a small proportion of sunlight before it reaches the Earth.

(5) As noted earlier, the term "activities" is broadly understood. There are certain other activities that are prohibited by international law, which are not covered by the present draft guideline, such as by the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques[1279] and Protocol I to the Geneva Conventions of 1949.[1280] Accordingly, the present draft guideline applies only to "non-military" activities. Military activities involving deliberate modifications of the atmosphere are outside the scope of the present guideline.

(6) Likewise, other activities will continue to be governed by various regimes. For example, afforestation has been incorporated in the Kyoto Protocol to the United Nations Framework Convention on Climate Change[1281] regime and in the Paris Agreement (article 5, paragraph 2). Under some international legal instruments, measures have been adopted for regulating carbon capture and storage. The 1996 Protocol (London Protocol)[1282] to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[1283] now includes an amended provision and annex, as well as new guidelines for controlling the dumping of wastes and other matter. To the extent that "ocean iron

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[1278] Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

[1279] See art. 1.

[1280] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, arts. 35, para. 3 and 55; see also Rome Statute of the International Criminal Court, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (b)(iv).

[1281] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162.

[1282] 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 7 November 1996), *International Legal Materials*, vol. 36 (1997), p. 7.

[1283] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, D.C., 29 December 1972), United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 138.

fertilization" and "ocean alkalinity enhancement" relate to questions of ocean dumping, the 1972 Convention and the London Protocol thereto are relevant.

(7) Activities aimed at intentional large-scale modification of the atmosphere have a significant potential for preventing, diverting, moderating or ameliorating the adverse effects of disasters and hazards, including drought, hurricanes, tornadoes, and enhancing crop production and the availability of water. At the same time, it is also recognized that they may have long-range and unexpected effects on existing climatic patterns that are not confined by national boundaries. As noted by the World Meteorological Organization with respect to weather modification: "The complexity of the atmospheric processes is such that a change in the weather induced artificially in one part of the world will necessarily have repercussions elsewhere … . Before undertaking an experiment on large-scale weather modification, the possible and desirable consequences must be carefully evaluated, and satisfactory international arrangements must be reached."[1284]

(8) It is also not the intention of the present draft guideline to stifle innovation and scientific advancement. Principles 7 and 9 of the Rio Declaration acknowledge the importance of new and innovative technologies and cooperation in these areas. At the same time, this does not mean that those activities always have positive effects.

(9) Accordingly, the draft guideline does not seek either to authorize or to prohibit such activities unless there is agreement among States to take such a course of action. It simply sets out the principle that such activities, if undertaken, should be conducted with prudence and caution. The reference to "prudence and caution" is inspired by the language of the International Tribunal for the Law of the Sea in the cases of *Southern Blue Fin Tuna*,[1285] the *Case of Mox Plant*;[1286] and the *Case concerning Land Reclamation*.[1287] The Tribunal stated in the last case: "*Considering* that, given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned." The draft guideline is cast in hortatory language, aimed at encouraging the development of rules to govern such activities, within the regimes competent in the various fields relevant to atmospheric pollution and atmospheric degradation.

(10) The last part of the guideline refers to "subject to any applicable rules of international law". It is understood that international law would continue to operate in the field of application of the draft guideline.

[1284] See *Second Report on the Advancement of Atmospheric Science and Their Application in the Light of the Developments in Outer Space* (Geneva, World Meteorological Organization, 1963); see also Decision 8/7 (Earthwatch: assessment of outer limits) of the Governing Council of the United Nations Environment Programme, Part A (Provisions for co-operation between States in weather modification) of 29 April 1980.

[1285] *Southern Blue Fin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at para. 77. The Tribunal stated that "*[c]onsidering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna".

[1286] *Mox Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at para. 84 ("*[c]onsidering* that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the Mox plant and in devising ways to deal with them, as appropriate").

[1287] *Case concerning Land Reclamation by Singapore in and around the Strait of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10, at para. 99.

(11) It is widely acknowledged that such an activity should be conducted in a fully disclosed and transparent manner, and that an environmental impact assessment provided for in draft guideline 4 may be required for such an activity. It is considered that a project involving intentional large-scale modification of the atmosphere may well carry an extensive risk of severe damage, and therefore that *a fortiori* an assessment is necessary for such an activity.

(12) A number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving, and is based on scant practice Other members were of the view that the draft guideline could be enhanced during second reading.

Chapter IX
Jus cogens

A. Introduction

97. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire Tladi as Special Rapporteur for the topic.[1288] The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

98. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), which sought to set out the Special Rapporteur's general approach to the topic and, on that basis, to obtain the views of the Commission on its preferred approach, and to provide a general overview of conceptual issues relating to *jus cogens* (peremptory norms of international law).

99. The Commission considered the first report at its 3314th to 3317th, and 3322nd and 3323rd meetings, from 4 to 8, and 18 and 19 July 2016.

100. At its 3323rd meeting, on 19 July 2016, the Commission referred draft conclusions 1 and 3, as contained in the Special Rapporteur's first report, to the Drafting Committee.

101. At its 3342nd meeting, on 9 August 2016, the Chairperson of the Drafting Committee presented an interim report of the Drafting Committee on "*Jus cogens*", containing the draft conclusions it provisionally adopted at the sixty-eighth session. The report was presented for information only, and is available on the Commission's website.[1289]

1. Introduction by the Special Rapporteur of the first report

102. The Special Rapporteur indicated that his first report addressed mainly conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition. The report also traced the historical evolution of *jus cogens* and the acceptance in international law of the elements central to the concept of *jus cogens*. It further raised a number of methodological issues on which members of the Commission were invited to comment. Chapter two of the report reviewed the debates in the Sixth Committee in 2014 and 2015. It was recalled that most States expressed support for the Commission's topic. In those debates, the Member States had raised several themes.

103. One such theme concerned the question whether the Commission should draft an illustrative list of norms that have already acquired the status of *jus cogens*. Some States had supported the idea. A number of other States, however, raised serious questions. The view of the Special Rapporteur was that the Commission should not base its decision

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[1288] At its 3257th meeting, on 27 May 2015 (*Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10)).

[1289] http://legal.un.org/ilc.

whether to provide an illustrative list on the possibility that some might interpret it as a *numerus clausus*. Nonetheless, he expressed the concern that seeking to provide an illustrative list could substantially change the nature of the topic, blurring the fundamentally process-oriented/methodological nature of the topic by shifting the focus towards the legal status of particular primary rules. In his view, the Commission might consider dispensing with the inclusion of an illustrative list. At the same time, the Commission could consider other ways to provide guidance to States and practitioners on norms which, at present, meet the requirements for *jus cogens*, without necessarily providing an illustrative list.

104. Another theme raised by Member States concerned methodology and in particular the materials on which the Commission would base its work and conclusions. In the view of the Special Rapporteur, the Commission should undertake a thorough analysis of the rich variety of practice, which included both State and judicial practice. In addition, scholarly writings on the topic, while not dispositive, could also assist in analysing primary sources.

105. The Special Rapporteur proceeded to provide an overview of the discussion in chapter IV of his report on the historical antecedents of *jus cogens*, both prior to and during the twentieth century. He observed that the position in international law of fundamental rules, at the time of the Second World War, could be summarized as follows: the literature, going back to the seventeenth century, recognized the existence of norms that States could not contract out of. There may have been disagreement about the basis for this proposition, but the proposition itself was not seriously questioned in the literature. Practice supporting the proposition, however, was scant. The little practice that could be found concerned peremptory treaty rules and not rules of general international law.

106. It was also recalled that the Commission, itself, has been instrumental in the development, acceptance and mainstreaming of *jus cogens* in international law, and that much of the recent practice, both judicial and State practice, had been inspired by the work of the Commission. From the time that Sir Hersch Lauterpacht introduced a provision on the invalidity of a treaty if its performance would involve an "act which is illegal under international law",[1290] to the inclusion of the term "*jus cogens*" in the respective reports of Sir Gerald Fitzmaurice[1291] and Sir Humphrey Waldock,[1292] members of the Commission did not question the basic proposition. There were questions about the drafting as well as the theoretical basis of the proposition of invalidity on the grounds of *jus cogens*, but not about the proposition itself, nor its status in international law.

107. Yet, what had not been foreseen was the acceptance of the proposition by States. Reference was made to the overview provided in the report on the position taken by States, and, in particular, the conclusion that "it [was] safe to say that almost all States expressed support"[1293] for the concept of *jus cogens*. At the same time, some States had raised important concerns about the drafting of the relevant provisions of the Vienna Convention on the Law of Treaties (the "1969 Vienna Convention").[1294] In particular, it was recalled that some States had expressed, at the Vienna Conference, the concern that, without clearer guidelines as to what norms constituted *jus cogens*, the text was likely to be abused in order to put into question validly concluded treaties. The solution found, at the time, was article 66 of the 1969 Vienna Convention, which established an important role for the International Court of Justice in relation to the invocation of *jus cogens* to invalidate a

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[1290] See H. Lauterpacht, report on the law of treaties, *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 154.

[1291] See first report of the Special Rapporteur (A/CN.4/693), para. 29.

[1292] *Ibid.*, para. 31.

[1293] At para. 33.

[1294] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

treaty. The important point, however, was that, contrary to widespread assumption, States did not question the idea of *jus cogens*, nor did they question its status as part of international law as it stood at the time.

108. The Special Rapporteur observed further that, subsequent to the adoption of the 1969 Vienna Convention, States had consistently invoked *jus cogens* in diplomatic and other communication. Moreover, judicial invocation of *jus cogens* had also increased, including through explicit recognition by the International Court of Justice,[1295] as well as by other international courts and tribunals, and by regional and national courts.

109. Reference was further made to chapter V of the report, in which the Special Rapporteur provided an overview of the theoretical debate concerning the nature of *jus cogens*, as found in the literature and judicial practice. No attempt was made at resolving the debate. At the same time, in his view, any attempt to distil the criteria for *jus cogens* needed to be based on an appreciation of its theoretical underpinnings.

110. The Special Rapporteur proposed three draft conclusions:[1296] the first dealt with the scope of the entire set of draft conclusions; the second sought to draw a distinction between *jus cogens* and other rules of international law that may be modified, abrogated or derogated from by the agreement of States, namely rules of a *jus dispositivum* character; the third sought to describe the general character of *jus cogens*. He observed that the reference, in the second paragraph of the third draft conclusion, to the character of *jus cogens* as being designed to protect the fundamental values of the international community, and their nature as hierarchically superior and universally applicable norms, was supported by practice and was widely accepted in the literature.

111. The Special Rapporteur further reiterated his view that draft conclusions were the most appropriate outcome for the topic. As regards the future programme of work, he

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[1295] See first report of the Special Rapporteur (A/CN.4/693), para. 46.

[1296] The text of the draft conclusions, as proposed by the Special Rapporteur in his first report, reads as follows:

Draft conclusion 1
Scope

The present draft conclusions concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them.

Draft conclusion 2
Modification, derogation and abrogation of rules of international law

1. Rules of international law may be modified, derogated from or abrogated by agreement of States to which the rule is applicable unless such modification, derogation or abrogation is prohibited by the rule in question (*jus dispositivum*). The modification, derogation and abrogation can take place through treaty, customary international law or other agreement.

2. An exception to the rule set forth in paragraph 1 is peremptory norms of general international law, which may only be modified, derogated from or abrogated by rules having the same character.

Draft conclusion 3
General nature of *jus cogens* norms

1. Peremptory norms of international law (*jus cogens*) are those norms of general international law accepted and recognized by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted.

2. Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.

envisaged that the Commission would consider: the criteria for *jus cogens*, in 2017; their consequences, in 2018; and any remaining miscellaneous issues, in 2019.

2. Summary of the debate

112. In welcoming the first report of the Special Rapporteur, members made reference to the wide support, among Member States, for consideration of the topic, as expressed in the Sixth Committee. At the same time, the Special Rapporteur was encouraged to keep in mind the differences in understandings expressed by Member States and, accordingly, to approach the topic with caution. It was also stated that the Commission should, from the outset, avoid an outcome that could result in, or be interpreted as, a deviation from the 1969 Vienna Convention. Several members pointed to the historical significance of the study being undertaken by the Commission. It was stressed that the scope of the topic extends beyond the law of treaties, and includes areas of international law such as the one on responsibility of States for internationally wrongful acts.

113. Members expressed support for the Special Rapporteur's recommendations on the methodology to be pursued. Agreement was expressed with his view that, in principle, the study should be based on both State and judicial practice, and supplemented by scholarly writings. The fact that the International Court of Justice and other international and regional courts and tribunals had referred to the concept in a number of cases was cited in support of the assertion that the existence of *jus cogens* was no longer seriously contested. The view was expressed that since the existence of *jus cogens* was well established, the task at hand was to determine the right balance between ordinary rules of international law, which could be modified by regular procedures, and certain foundational rules, which could not be so modified. At the same time, some members cautioned that the Commission should avoid purporting to create new peremptory norms, and stated that the Commission should proceed from the assumption that peremptory norms, by their nature, were exceptions. It was also suggested that a distinction be drawn between reviewing the pronouncements of international courts and tribunals in the determination of the existence of *jus cogens*, and the practice of States, which gave the norms in question their peremptory character.

114. The view was expressed that the theoretical basis of *jus cogens* was not necessarily to be found in any one particular school of thought (naturalist or positivist). Nor was it necessarily based on consent. Instead, its obligatory force was based on a general practice of States — undertaken as a matter of law — which considered the norms in question to be non-derogable (even if they could be replaced by other norms of the same character). In terms of a further view, it was important for the Commission to adhere as closely as possible to the agreed language of the 1969 Vienna Convention. In that connection, several members were of the view that articles 53 and 64 of the 1969 Vienna Convention offered a satisfactory legal basis, by emphasizing the acceptance and recognition of a norm by the international community of States. In terms of a further view, such recognition should be extended to that of other entities, such as international and non-governmental organizations, and the international society more broadly. It was also suggested that if the Special Rapporteur were to undertake further study of the theoretical aspects of *jus cogens*, he could look at the link between the concept of *jus cogens* and that of transnational public policy. In terms of yet another view, the Commission should not refrain from taking a position on some of the theoretical issues, as doing so would help guide it, for example, in developing an illustrative list of norms.

115. It was suggested that, on the basis of the discussion in the Special Rapporteur's report, the following elements of *jus cogens* could be identified: derogation from a peremptory norm was impermissible; the rule or rules in question formed part of general international law; a peremptory norm was recognized as such by the international community; it was universally applicable; the fact of non-derogability was a consequence

of its peremptory status; *jus cogens* norms were hierarchically superior to other rules of international law; *jus cogens* norms had as their purpose the protection of international public order (*ordre public*). It was expressed that *jus cogens* norms are essentially norms of customary international law with a special form of *opinio juris*, that is, the conviction of the existence of a legal right or obligation of a peremptory character. Accordingly, such a norm consist of a general practice accepted as peremptory law. In other words, a general practice accompanied by *opinio juris* cogens. It was also pointed out that treaties might be at the origin or reflect norms of *jus cogens*, and that peremptory norms might also be based on general principles of law, which deserve further study. At the same time, the Special Rapporteur was called upon to undertake an in-depth study of the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention.

116. Members expressed different views concerning the possibility of developing an illustrative list of norms that had acquired the status of *jus cogens*. Reference was made in the debate to the fact that the concept of *jus cogens* was recognized in the constitutions of several States. That made the possibility of developing an indicative list of such norms, as recognized by international law, particularly significant. According to such views, the usefulness of the work on the topic would be diminished were the Commission not to develop an indicative list, or if it were to limit itself to providing mere examples. The view was also expressed that consideration of the topic should not be limited to methodological considerations. It was stated that a global society required global norms, and that the Commission could contribute to the identification of such norms through, *inter alia*, the preparation of a list of peremptory norms, even if they were only indicative. It was observed that, unlike when the 1969 Vienna Convention was adopted, a variety of legal materials existed from which to draw on in order to develop a list of such norms. Furthermore, contrary to work on the topic of "Identification of customary international law" where the drawing up of a list of customary rules would not have been feasible, the relatively limited number of *jus cogens* norms made it possible to envisage such a list. It was thought that the Commission could also take into account the examples identified in its previous work, including that on responsibility of States for internationally wrongful acts,[1297] the fragmentation of international law,[1298] the responsibility of international organizations[1299] and reservations to treaties.[1300] It was also recalled that the Commission had developed an illustrative list in the context of its work on the effects of armed conflicts on treaties.[1301] In considering drawing up a list, some members also pointed out that the Commission could look at the judgments and decisions of international courts and tribunals, at the global and regional levels.

117. Support was further expressed for the possibility of dealing with the matter through a discussion of illustrative examples in the commentary, or in an annex, although the view was also expressed that there was little difference between those options and drawing up an illustrative list. It was also suggested that the Commission postpone a decision on the matter until a later stage.

118. Several other members were of the view that it was not advisable to seek to develop such a list, nor even to provide illustrative examples in the commentary, as that would necessarily require the Commission to take a position on the status of the rules in question. The concern was also that attempting to produce such a list might involve considerable

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[1297] See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. IV, sect. E.

[1298] See *Yearbook ... 2006*, vol. II (Part Two), chap. XII, sect. D, and A/CN.4/L.682 and Corr.1.

[1299] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, sect. E.

[1300] *Ibid.*, chap. IV, sect. F (for the commentary to the draft guidelines, see A/66/10/Add.1).

[1301] *Ibid.*, chap. VI, sect. E.

additional work and detailed analysis of substantive areas of law, and lead to fruitless disputes about the inclusion or non-inclusion of norms. The concern was also expressed that establishing a list, even if only illustrative, would result in equally important rules of international law being given an inferior status.

119. Several members also expressed doubts as to the existence of regional *jus cogens*. It was maintained that such a possibility, by definition, contradicted the universal applicability of *jus cogens*. Furthermore, such a possibility raised questions as to their legal effects in relation, for example, to States outside the region in question, as well as the relationship between universal and regional *jus cogens*. The concern was also expressed that if the notion of regional *jus cogens* were recognized, there would, in principle, be no bar to also recognizing subregional norms, which could further undermine the concept, and potentially lead to the fragmentation of international law.

120. However, other members pointed out that some references to regional *jus cogens* with respect to certain norms had been made, for example, by the Inter-American Commission on Human Rights. Reference was also made to the possibility that regional rules of *jus cogens* existed in Europe Accordingly, the possibility of other forms of peremptory norms, such as regional norms, deserved further study, and should not *a priori* be excluded. It was also suggested that while there might be no reason, in principle, to limit the concept to rules of universal applicability, the Commission could decide simply to limit the scope of its study to only *jus cogens* of universal applicability.

121. Several members emphasized the incompatibility of the notion of the persistent objector with *jus cogens* norms, which have by definition a universal peremptory character. In this regard, those members added it would be impossible to admit, for example, a persistent objector to the prohibition of the crime of genocide. In terms of another view, it was too early to take a decision on that point, since the Commission had not yet considered the meaning of the phrase "accepted and recognized by the community of States as a whole". It was also suggested that a distinction be drawn between an analysis of the source of *jus cogens* and the effect of their application, with the persistent objector being concerned more with the latter than the former.

122. General support was expressed for the proposal that the Commission focus on developing draft "conclusions" on the topic. At the same time, the view was expressed that it would have been preferable for the Commission to consider the type of outcome after analysing all the elements of peremptory norms.

123. As regards proposed draft conclusion 1, the view was expressed that it was not clear whether the process of "identification" was merely a matter of recognition or whether it included a normative exercise of determination of the existence and content of a norm. It was also suggested that the provision be recast more clearly in the form of a provision concerning scope, and that it could be expanded to include the activities of non-State actors. It was also suggested that express mention be made not only of the criteria for the determination of *jus cogens*, but also its content.

124. Concerning draft conclusion 2, doubts were expressed about the necessity of drawing a comparison with *jus dispositivum*. Several members suggested that the matter could be dealt with in the commentary. Doubts were also expressed about the appropriateness of including a reference to the modification, derogation or abrogation of regular rules of international law. It was also pointed out that it was confusing to treat *jus cogens* as, on the one hand, hierarchically superior, while, on the other hand, as an exception to a standard rule. A doubt was also expressed as to the extent to which the proposed formulation suggested that parties to a treaty could bind themselves simply by proclaiming that a particular treaty rule may not be changed by their own agreement. It was

maintained that a rule did not acquire the character of *jus cogens* simply by the agreement of parties to a treaty.

125. Several members suggested that draft conclusion 3 be recast as a definition of *jus cogens*, and it was proposed that the provision track the formulation of article 53 of the 1969 Vienna Convention as closely as possible. Several members expressed support for the content of paragraph 2, while several others expressed doubts concerning its inclusion. It was maintained that there was no practice to support the inclusion of the elements listed in paragraph 2, which also seemed to depart from the definition provided in article 53 of the 1969 Vienna Convention. The view was expressed that the distinctive feature of *jus cogens* norms was less their hierarchical nature, and more their special importance. The Commission was cautioned against the risk of inadvertently creating additional requirements for the recognition of *jus cogens*. The view was expressed that the notion of "hierarchical superiority" was unclear, and potentially misleading, including because it blurred the distinction between the identification of *jus cogens* and the consequences of conflict with such norms. In terms of a further view, the reference to "hierarchy" required further elaboration of the particular kind of hierarchy produced by *jus cogens*, which was based on the nullity of treaties that contravened it, as opposed to other hierarchies in international law, such as that established by Article 103 of the Charter of the United Nations. In terms of different view, the hierarchical superiority of peremptory norms was well established and had been recognized by the Commission itself in its work on the fragmentation of international law. It was further suggested that paragraph 2 could be made the subject of a separate draft conclusion.

126. Several members also expressed their disagreement with the necessity of referring to "the values of the international community", since the existence of *jus cogens* depended upon its acceptance and recognition as such by the international community of States as a whole and not on a subjective assessment of values. Another view was that the reference to "fundamental values" was too narrow if it only referred to those *jus cogens* norms of a humanitarian character, to the exclusion of others, such as the prohibition on the use of force. Accordingly, it was proposed that the draft conclusion refer instead to "the most fundamental principles". In terms of a further view, the provision could, in fact, usefully supplement the 1969 Vienna Convention by clarifying the nature of *jus cogens* through the inclusion of a reference to the "fundamental values of the international community as a whole".

127. Notwithstanding the views expressed on the possibility of the existence of regional *jus cogens*, support was expressed for the element of "universal applicability", which was listed in paragraph 2.

128. Other suggestions included developing a further draft conclusion on the definition of *jus cogens*. It was also recommended that there be more consistency in referring to either "norms" or "rules". A preference was expressed for using "norms", as had been done in the 1969 Vienna Convention. A further suggestion was to change the title of the topic to "*jus cogens* in international law", "peremptory norms" or "*jus cogens* in the international legal order". It was also suggested that the draft conclusions deal with the invalidating effect of *jus cogens*, including the question of who determines whether there is a conflict with *jus cogens*.

129. Support was expressed for the Special Rapporteur's indication of the planned future work on the topic. It was suggested that the Special Rapporteur also investigate the relationship between general principles of law and *jus cogens*. Other suggestions for future work included analysing: the phrase "accepted and recognized by the international community of States as a whole" and the extent to which such a concept was synonymous with consent; the relationship between *jus cogens* and *erga omnes* obligations; the extent to which non-derogation was a defining characteristic of *jus cogens*; the process by which a

subsequent peremptory norm could replace such a previous norm; the relationship between the existence of fundamental values underlying *jus cogens* and the expression of their existence; the dispute settlement mechanism in article 66 of the 1969 Vienna Convention; and the question of how to regulate conflict between contradictory peremptory norms.

3. Concluding remarks of the Special Rapporteur

130. In responding to the debate, the Special Rapporteur addressed the comments on the theoretical basis for *jus cogens*, and expressed his disagreement with those who were of the view that article 53 of the 1969 Vienna Convention resolved the matter. Nevertheless, he remained of the view that it was not necessary for the Commission to resolve the matter.

131. It was noted that there had been general agreement on the need to base the study mainly on the practice of States, judicial decisions and scholarly writings, as appropriate. In response to views, expressed in the debate, that some of the elements in his first report were not fully substantiated by State practice, or that the relative lack of such practice made it necessary to fall back on theoretical constructs, the Special Rapporteur recalled that there existed a significant amount of State and judicial practice.

132. Concerning the possibility of developing an illustrative list, the Special Rapporteur noted the differences of opinion within the Commission, and acknowledged that the possibility of developing such a list sounded attractive. Nonetheless, he recalled his concern that it would detract from the methodological focus of the topic. However, he remained open to the possibility of an illustrative list, focusing on the most well-accepted peremptory norms.

133. On the question of regional *jus cogens*, the Special Rapporteur reiterated his intention to consider the matter in future reports. At the same time, while he did not believe that the notion of a regional *jus cogens* norm was well founded in international law, in his view the universal character of *jus cogens*, which was well established, did not *a priori* exclude the possibility of regional peremptory norms.

134. The Special Rapporteur further confirmed that he did not intend to overlook the implication of *jus cogens* in the context of the responsibility of States for internationally wrongful acts. As had been indicated in the syllabus, the topic was broader than the law of treaties. His intention had been to deal with such matters in later reports on the consequences of *jus cogens*. He did, however, express disagreement with the view that the nature and definition of *jus cogens* may be different depending on the area of international law.

135. As regards future work, he had taken note of the views concerning the possibility of treaty-based *jus cogens*. He further confirmed his intention to consider the relationship between *jus cogens* norms and *erga omnes* obligations.

136. Concerning the proposed draft conclusions, the Special Rapporteur noted the various drafting suggestions made in the debate. He also accepted the criticism that draft conclusion 2 dealt with issues that were outside the scope of the topic. He explained that he had intended, by means of the draft proposal, to make the point that peremptory norms were, by their very nature, exceptional in relation to other rules of international law. Nonetheless, he accepted the view of the Commission that the proposed draft conclusion need not be referred to the Drafting Committee.

137. As regards draft conclusion 3, while he was open to the suggestions for improvement to paragraph 1, including aligning the formulation with that in article 53 of the 1969 Vienna Convention, he disagreed with those members of the Commission who had suggested that there existed no, or a limited, basis in the practice of States and in the pronouncements of courts and tribunals to support the inclusion of the elements of

fundamental values, hierarchical superiority and universal applicability of *jus cogens*. In addition to the authorities in his first report, he provided additional authorities for the positions taken by States on *jus cogens*, primarily within the context of the United Nations, as well as the pronouncements of courts and tribunals.

138. He further expressed the view that there was merit in considering suggestions for modifying the title of the project and that this could be considered in a future report.

Chapter X
Protection of the environment in relation to armed conflicts

A. Introduction

139. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[1302]

140. At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1).[1303] At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur (A/CN.4/685)[1304] and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee (A/CN.4/L.870).

B. Consideration of the topic at the present session

141. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which it considered at its 3318th to 3321st and 3324th meetings, from 12 to 15 July and on 20 July 2016.

142. In her third report, the Special Rapporteur focused on identifying rules of particular relevance to post-conflict situations, while also addressing some issues relating to preventive measures to be undertaken in the pre-conflict phase, as well as the particular situation of indigenous peoples (chapter II). The Special Rapporteur proposed three draft principles on preventive measures,[1305] five draft principles concerning the post-conflict

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[1302] The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 167). For the syllabus of the topic, *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), annex E.

[1303] *Ibid., Sixty-ninth* Session, *Supplement No. 10* (A/69/10), paras. 186-222.

[1304] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 130-170.

[1305] The text of draft principles I-1, I-3 and I-4, as proposed by the Special Rapporteur in her third report, reads as follows:

Draft principle I-1
Implementation and enforcement

States should take all necessary steps to adopt effective legislative, administrative, judicial or other preventive measures to enhance the protection of the natural environment in relation to armed conflict, in conformity with international law.

Draft principle I-3
Status of forces and status of mission agreements

States and international organizations are encouraged to include provisions on environmental regulations and responsibilities in their status of forces or status of mission agreements. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Draft principle I-4
Peace operations

States and organizations involved in peace operations shall consider the impacts of those operations on the environment and take all necessary measures to prevent, mitigate and remediate the negative environmental consequences thereof.

phase[1306] and one draft principle on the rights of indigenous peoples, placed in Part Four of the draft principles.[1307] In her report, the Special Rapporteur also provided a brief analysis of the work conducted so far and made some suggestions for the future programme of work on the topic (chapter III).

143. At its 3324th meeting, on 20 July 2016, the Commission referred draft principles I-1, I-3, I-4, III-1 to III-5 and IV-1, as contained in the third report of the Special Rapporteur, to the Drafting Committee.

[1306] The text of draft principles III-1 to III-5, as proposed by the Special Rapporteur in her third report, reads as follows:

Draft principle III-1
Peace agreements

Parties to a conflict are encouraged to settle matters relating to the restoration and protection of the environment damaged by the armed conflict in their peace agreements.

Draft principle III-2
Post-conflict environmental assessments and reviews

1. States and former parties to an armed conflict are encouraged to cooperate between themselves and with relevant international organizations in order to carry out post-conflict environmental assessments and recovery measures.

2. Reviews at the conclusion of peace operations should identify, analyse and evaluate any environmentally detrimental effects of those operations on the environment, in an effort to mitigate or remedy those detrimental effects in future operations.

Draft principle III-3
Remnants of war

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps, explosive ordnance and other devices shall be cleared, removed, destroyed or maintained in accordance with obligations under international law.

2. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

Draft principle III-4
Remnants of war at sea

1. States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment, public health or the safety of seafarers.

2. To this end States and organizations shall endeavour to survey maritime areas and make the information freely available.

Draft principle III-5
Access to and sharing of information

In order to enhance the protection of the environment in relation to armed conflicts, States and international organizations shall grant access to and share information in accordance with their obligations under international law.

[1307] The text of draft principle IV-1, as proposed by the Special Rapporteur in her third report, reads as follows:

Draft principle IV-1
Rights of indigenous peoples

1. The traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment shall be respected at all times.

2. States have an obligation to cooperate and consult with indigenous peoples, and to seek their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands.

144. At the same meeting, the Commission also decided to refer back to the Drafting Committee the draft introductory provisions and draft principles contained in the report of the Drafting Committee (A/CN.4/L.870) that the Commission had taken note of during its previous session to address some technical issues in the text involving the use of brackets and some inconsistencies regarding the terminology employed.

145. At its 3337th and 3342nd meetings, on 5 and 9 August 2016 respectively, the Chairperson of the Drafting Committee presented[1308] two reports of the Drafting Committee on "Protection of the environment in relation to armed conflicts". The first contained the draft introductory provisions and draft principles taken note of by the Commission during the sixty-seventh session (2015), which had been renumbered and revised for technical reasons by the Drafting Committee (A/CN.4/L.870/Rev.1). The Commission provisionally adopted draft principles 1, 2, 5 [I-x], 9 [II-1], 10 [II-2], 11 [II-3], 12 [II-4], 13 [II-5] (see section C.1 below). At its 3344th meeting, on 10 August 2016, the Commission adopted the commentaries to the draft principles provisionally adopted at the present session (see section C.2 below).

146. The second report contained draft principles 4, 6, 7, 8, 14, 15, 16, 17, and 18 provisionally adopted by the Drafting Committee at the present session (A/CN.4/L.876). The Commission took note of the draft principles as presented by the Drafting Committee.[1309] It is anticipated that commentaries to the draft principles will be considered at a future session.

[1308] The statements of the Chairperson of the Drafting Committee are available on the website of the Commission (http://legal.un.org/ilc).

[1309] The text of the draft principles provisionally adopted by the Drafting Committee reads as follows:

Introduction

[...]

Part One

General principles

Draft principle 4

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.

2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

[...]

Draft principle 6

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Draft principle 7

Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

1. Introduction by the Special Rapporteur of the third report

147. The Special Rapporteur stated that the main purpose of the third report was to identify rules of particular relevance in post-conflict situations, and also address some

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Draft principle 8
Peace operations

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

Part Two
Principles applicable during armed conflict

[…]

Part Three
Principles applicable after an armed conflict

Draft principle 14
Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Draft principle 15
Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Draft principle 16
Remnants of war

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Draft principle 17
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

Draft principle 18
Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

preventive measures that had not been dealt with in the previous reports. She recalled that the preliminary report had provided an overview of pertinent rules and principles applicable to a potential armed conflict (pre-conflict phase) and that the second report had identified existing rules of armed conflict directly relevant to the protection of the environment during armed conflict. The three reports sought to provide an overview of the applicable law before, during and after an armed conflict (phases I, II and III, respectively) in an attempt to close the circle of the three temporal phases. She observed that there were no clear-cut boundaries between the various phases and that it was important to read the reports together for a proper understanding of the topic.

148. The third report did not attempt to undertake a comprehensive review of international law in general, but examined specific conventions and legal issues that were of particular relevance to the topic. It addressed, *inter alia*, pertinent aspects with regard to conventions on legal liability, international investment agreements, rights of indigenous peoples, remnants of war, as well as the practice of States in the form of peace agreements and the status of forces and status of mission agreements. One section was also dedicated to the practice of international organizations, with special emphasis on the United Nations Environment Programme (UNEP). In addition, the Special Rapporteur indicated that the report provided a brief recapitulation of the discussions within the Commission during the previous session, as well as information on the views and practice of States and of select case law. She noted, however, that similarly to the findings in the second report, the case law in this area rarely covered environmental harm in and of itself; it almost always took the form of damage to natural resources or property. The Special Rapporteur further highlighted the section of the report that addressed the question of access to and sharing of information and the obligation to cooperate (paras. 130-152), which she considered of particular importance for all three phases of the topic.

149. The report contained proposals for nine draft principles. Three draft principles were proposed for Part One, which primarily concerned preventive measures (pre-conflict phase). Draft principle I-1 addressed the need for States to adopt legislative, administrative, judicial or other preventive measures at the domestic level to enhance the protection of the environment. The draft principle was short and general in nature. Draft principle I-3 reflected the emerging trend among States and organizations to address environmental matters in the status of forces and status of mission agreements. Draft principle I-4 dealt with environmental consequences of peace operations and the importance of taking the necessary measures to prevent, mitigate and remediate any negative impact of such operations.

150. Five draft principles were proposed for Part Three, which related to post-conflict measures. Draft principle III-1 addressed peace agreements, which, it was noted, increasingly regulate environmental questions. Draft principle III-2 concerned the need to undertake post-conflict environmental assessments and reviews and consisted of two paragraphs. Whereas paragraph 1 encouraged cooperation among States and former parties to an armed conflict for this purpose, including with States that were not parties to the conflict, paragraph 2 dealt with steps to be taken after the conclusion of a peace operation. The purpose of the draft principle was not to attribute responsibility, but rather to ensure that assessments and recovery measures could be undertaken. Draft principles III-3 and III-4 dealt with remnants of war and remnants of war at sea, respectively. Draft principle III-3 was general in nature and primarily reflected obligations that already exist under the law of armed conflict. The emphasis was on the need to act without delay and to cooperate to eliminate threats from remnants of war. Draft principle III-4 specifically addressed remnants of war at sea. The Special Rapporteur observed that those remnants were not directly regulated under the law of armed conflict and entailed particular complexities in light of the different legal statuses of various maritime zones. The two draft principles aimed at covering all types of remnants that constituted a threat to the environment. Draft

principle III-5 concerned the need for States and international organizations to grant access to and share information in order to enhance the protection of the environment. These were seen as essential requirements to ensure effective cooperation.

151. One draft principle was proposed for Part Four. Draft principle IV-1 reflected the present legal status of indigenous peoples and their lands and territories under relevant international legal instruments and case law. The Special Rapporteur foresaw that more draft principles could be added to this part.

152. The Special Rapporteur further drew attention to certain issues that the third report did not cover, including the Martens clause and issues relating to occupation, and observed that the Commission may wish to consider these matters in its future work on the topic. In addition, she highlighted several other issues that may be pertinent for the topic, such as questions on responsibility and liability, as well as the responsibility and practice of non-State actors and organized armed groups in non-international armed conflicts. The Special Rapporteur also observed that it might be appropriate to include a clear reference in a future preamble to the Commission's articles on the effects of armed conflicts on treaties,[1310] which was of particular relevance for the present topic.

153. Finally, the Special Rapporteur encouraged continued consultations with other entities, such as the International Committee of the Red Cross (ICRC), the United Nations Environment Programme (UNEP) and other relevant parts of the United Nations system and regional organizations, and pointed out that the Commission may find it useful to continue to receive information from States on national legislation and case law relevant to the topic.

2. Summary of the debate

(a) General comments

154. The importance of the topic was reiterated by some members, noting not only its contemporary relevance but also the challenges it presented, in particular since it sat at a cross-section of various legal fields. The fact that the Special Rapporteur, through her reports, had treated the three temporal phases as equally important had contributed to the development of the topic. While some members acknowledged the purpose of the third report, they also observed that its structure had made it difficult to clearly discern the relevance of the materials presented with regard to the intended temporal phase. In this regard, the view was expressed that it was necessary to clearly distinguish between the three temporal phases and to identify the applicable law in each of them. To facilitate consideration of the topic, a suggestion was made that the pre-conflict and post-conflict phases be limited to the period immediately before and immediately after the hostilities, respectively.

155. While some members welcomed the wealth of materials included in the report, other members observed that it was too extensive and included information that was of limited relevance. This had made it difficult to obtain a proper understanding of the direction the topic was taking. It would have been more conducive if the report had provided an extensive analysis of relevant materials upon which the draft principles were based, thereby justifying their content.

156. Some members agreed with the Special Rapporteur that an examination of all environmental treaties to determine their continued applicability during armed conflict was

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[1310] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. VI, sect. E.

not warranted. It was recalled that the Commission had already studied this question in the context of its work on the articles on the effects of armed conflicts on treaties. Environmental agreements featured in the indicative list of treaties the subject-matter of which implied that they continue in operation.[1311] The articles and the commentaries thereto were certainly relevant for the current topic.

157. Caution was expressed by some members against an attempt to simply transpose peacetime obligations to deal with the protection of the environment in relation to armed conflict. While it was acknowledged that it was not necessary to examine the continued applicability of every environmental law treaty during armed conflict, such an exercise was nevertheless required for those rules that were considered relevant for the topic. In this context, the term "applicability" raised two questions that needed to be addressed, namely, whether or not the rule applied, in the formal sense, and whether applicability of the rule could be transposed to situations of armed conflict or if this required that the rule be adapted. It was pointed out that this sort of analysis seemed to be lacking with regard to a number of the proposed draft principles.

158. Also with regard to methodology, it was pointed out that the draft principles needed to differentiate between international and non-international armed conflicts since the rules applicable to the two categories of conflicts differed, as did the stakeholders involved.

159. Regarding the scope of the topic, while some members welcomed the broad approach suggested by the Special Rapporteur, other members considered the report and the proposed draft principles to extend too far beyond the protection of the environment as such by also addressing the environment as a natural resource and as a human environment, bringing in a human rights perspective. Furthermore, whereas some members considered that the scope of the topic should be limited to the natural environment, some other members supported a more comprehensive approach.

160. The need to use uniform terminology throughout the draft principles was also raised. This was particularly relevant with regard to the terms "environment" and "natural environment".

161. Concerning the outcome of the topic, while some members reiterated their support for draft principles, it was also suggested that a more prescriptive approach may be envisaged, such as draft articles. Several members stressed the importance of ensuring that the terminology employed in the draft principles corresponded to the normative status intended for the topic. In this regard, references were made to the inconsistent use of the terms "shall", "should" and "are encouraged".

162. The detailed information on State practice and analysis of applicable rules contained in the report was welcomed by some members. Certain submissions were considered of particular interest in putting forward the viewpoints of the victims of environmental damage from armed conflict.

(b) Draft principle I-1 — Implementation and enforcement

163. While several members found the content of draft principle I-1 to be pertinent for the topic, some other members pointed out that the draft principle was not substantiated by the materials contained in the report and that it was therefore difficult to properly appreciate it. Generally, members observed that the preventive measures envisaged in the draft principle needed to be further specified as it was drafted in overly broad terms. It was also

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[1311] See the indicative list referred to in article 7, which appears in the annex to the articles on the effects of armed conflicts on treaties (*ibid.*).

noted that the temporal scope of the draft principle was unclear. In this regard, some members were of the view that the draft principle was equally relevant to the post-conflict phase as to the pre-conflict phase. The draft provision's relationship with the ensuing draft principles in Part One also required clarification, in particular whether the latter constituted different forms of application of the former. It was also suggested that the title be revisited to better correspond to the content of the draft principle.

(c) Draft principle I-3 — Status of forces and status of mission agreements

164. The relevance of draft principle I-3 for the topic was questioned by several members. In their view, status of forces and status of mission agreements did not concern the conduct of stationed forces as envisaged in the proposed provision and did not relate directly to armed conflict as such. It was suggested that the reference to such agreements be replaced with "special agreements" if the provision was going to be retained. It was, however, pointed out that contemporary status of forces and status of mission agreements seemed to include provisions on environmental protection and the measures proposed in the draft principle could therefore be contemplated. While acknowledging that status of forces and status of mission agreements did not address armed conflict, some other members nevertheless considered that the draft principle constituted an important preventive measure, which could address other potential environmental consequences, such as contamination of military bases. It was further stressed that the "polluter pays" principle be reflected in the draft principle. The view was also expressed that the last sentence of the draft principle enumerating various measures gave rise to confusion as to which temporal phase the draft provision belonged.

(d) Draft principle I-4 — Peace operations

165. Recognizing that peace operations increasingly seemed to take into account environmental concerns, several members expressed support for addressing this issue in the context of the topic. They questioned, however, the placement of the draft principle in the pre-conflict phase, since the measures exemplified in the proposed provision seemed applicable not only during the preventive phase, but also during the operation phase (mitigation) and the post-conflict phase (remediation). The obligations should thus either be reflected in each phase or placed in an overarching section dealing with general principles that were relevant for all temporal phases. It was also pointed out that peace operations could play an important role in post-conflict recovery and the draft principle should therefore focus on restorative and remediation measures. In order to define better the scope of the draft principle, it was suggested that the term "peace operation" be defined for the purpose of the draft principle, or at least explained in the commentary. Furthermore, the language in the draft principle needed to be more permissive in order to better reflect the current status of the law — no corresponding obligation seemed yet to exist under international law. In this regard, some members observed that the report did not contain sufficient research and analysis of the practice with regard to peace operations to substantiate the content of the proposed provision. It was further pointed out that the premise upon which a peacekeeping operation was based, in particular the non-use of force and consent of the parties, distinguished it from armed conflict. Including peacekeeping operations in the scope of the topic risked portraying its engagement as armed conflict, endangering the viability and usefulness of such operations as a whole.

(e) Draft principle III-1 — Peace agreements

166. Several members expressed support for draft principle III-1 and agreed that peace agreements should contain provisions concerning the restoration of environmental damage caused by armed conflict. It was nevertheless emphasized that post-conflict environmental protection management and the allocation of responsibilities for such management fell

outside the scope of the topic. Pointing to what they saw as a *lacuna* in the draft principle, some members were of the view that peace agreements should also include provisions addressing questions relating to incrimination, allocation of responsibility for environmental damage and compensation. It was stated that the facilitating role played by international and regional organizations concerning the inclusion of such provisions in peace agreements should also be reflected.

167. Some other members observed that the draft principle referred to armed conflict without any qualifier as to the nature of the conflict and without distinguishing between States and non-State actors. Such an approach was problematic since the dynamics between the parties to the conflict differed significantly in international and non-international armed conflicts; in the latter case, a party to the conflict may simply vanish. Furthermore, providing non-State actors with obligations similar to those of States risked legitimizing a party to the conflict. In this regard, suggestions were made that the material scope of the draft principle be limited to international armed conflicts, while noting, however, that this may require further study since the report had mainly examined peace agreements in respect of non-international armed conflicts. The view was nevertheless also expressed that peace agreements between States were rarely concluded these days and, if concluded, usually did not contain provisions on environmental protection. The scope should therefore be limited to non-international armed conflicts.

(f) Draft principle III-2 — Post-conflict environmental assessments and reviews

168. The importance of post-conflict environmental assessments and reviews were generally recognized by the members of the Commission. It was noted that the draft principle did not reflect existing legal obligations under international law but proposed an important policy consideration. Questions were nevertheless raised with regard to the temporal scope of paragraph 1 of the draft principle, both with regard to the point in time when such assessments and reviews were supposed to be carried out and to its placement in the post-conflict phase. Concerning the former, it was pointed out that former belligerents were unlikely to cooperate immediately after the cessation of hostilities, which left an important temporal gap to be filled. With regard to the latter, it was suggested that assessments and reviews were equally important during the armed conflict phase, especially when damage required immediate mitigating measures. Moreover, the view was expressed that the scope of paragraph 1 of the draft principle should be limited to States since the need for cooperation with non-State actors could only be evaluated on a case-by-case basis. Concerning paragraph 2, it was observed that if the intention was only to conduct such assessments for the benefit of future operations, which in itself was questioned, the provision would be better placed in the preventive phase, or could be deleted all together since it was covered in draft principle I-4. It was further suggested that the draft principle should also reflect the need to protect personnel conducting environmental assessments and reviews.

169. It was further pointed out that an analysis on how and to what extent the environmental rule upon which the draft principle was based was required in order to properly evaluate its relevance and applicability in relation to armed conflict.

(g) Draft principle III-3 — Remnants of war, and draft principle III-4 — Remnants of war at sea

170. Several members considered that draft principles III-3 and III-4 were highly pertinent for the topic. Some members observed, however, that the link to the protection of the environment must be further specified in the draft principles. This was particularly true with regard to draft principle III-3, which seemed to be justified on the basis of harm done to humans and property rather than to the environment. For similar reasons, it was pointed

out that the reference to public health and the safety of seafarers in draft principle III-4 should be deleted.

171. Draft principle III-3 also required clarification with regard to who should have the primary responsibility to carry out the obligations contained therein. In this regard, some members expressed the view that such responsibility should remain with the State having effective jurisdiction and relevant international organizations; it would be unrealistic to expect non-State actors involved in the armed conflict to carry out the measures envisaged in the draft principle. It was also suggested that a duty of notification as contained in article 5 of the Convention relative to the Laying of Automatic Submarine Contact Mines[1312] be incorporated into the draft principle.

172. Several references were made to the use of the term "without delay" in paragraph 1 of draft principle III-3, which seemed to neither reflect practice nor appear realistic. The removal of remnants of war would only be considered a priority after the cessation of hostilities if such removal was necessary to satisfy the immediate needs of the population. The point was also made that paragraph 2 of the same draft principle seemed to lay down unconditional obligations that went beyond State practice.

173. Another area requiring further examination concerned the types of remnants of war that the draft principles aimed to cover, the current wording seeming over-inclusive and under-inclusive at the same time. In this respect, while several members considered it important to take a broad, non-exhaustive approach, it was also observed that attempting to cover all remnants of war would require further study. It was also suggested that the type of information envisaged under paragraph 2 of draft principle III-4 be further specified, possibly in the commentaries.

174. Some members stressed that the relationship between draft principles III-3 and III-4 necessitated further clarification. It was unclear, for example, if draft principle III-3 was of a generic character. Some suggestions were made that the two provisions could be merged. It was also observed that the draft principles did not contain corresponding obligations and the question was raised why the obligation to remove remnants of war had been omitted from draft principle III-4. The view was further expressed that the question of allocation of responsibility for the removal of remnants of war at sea should be reflected in the draft principle.

(h) Draft principle III-5 — Access to and sharing of information

175. While granting access to and sharing of information was generally considered to be important for the purpose of the topic, some members were of the view that draft principle III-5 was drafted in excessively broad terms. The scope of the obligation needed to be both clarified and adjusted, in particular to take into account situations where States had valid reasons not to share information, for example due to national security concerns. It was nevertheless also pointed out that since the obligation was drafted with the caveat "in accordance with their obligations under international law" the proposed provision did not imply such extensive obligations. Some members observed that since granting access to and sharing information rested on the consent of the State, the language in the draft principle needed to be less prescriptive. It was also noted that granting access to and sharing of information were two distinct obligations, and that it was not possible to address them in the same manner.

[1312] Convention (VIII) of 1907 relative to the Laying of Automatic Submarine Contact Mines (The Hague, 18 October 1907), *The Hague Conventions and Declarations of 1899 and 1907*, J.B. Scott, ed. (New York, Oxford University Press, 1915), p. 151.

176. Several members observed that the temporal scope of the draft principle needed to be specified since it was unclear at what point in time the information should be shared. Due to the general nature of the draft principle, some members considered that it applied to all three phases and that it would be better placed in a part dealing with "general principles". However, other members stressed that the obligation to grant access to and share information could not apply to phase II (during armed conflict). The principle for granting access to and sharing of information was based on rules applicable in peacetime and could not simply be transposed to situations of armed conflict. The point was also made, however, that should the draft principle be applicable during the armed conflict phase, sufficient caveats could be employed to clarify the scope of the obligation so that it would not relate to matters of national security or defence. A suggestion was also made to specify that the draft principle only related to the post-conflict phase. Clarifications were sought as to which actors access to information should be granted and what type of information should be shared during each respective phase.

(i) Draft principle IV-1 — Rights of indigenous peoples

177. Several members considered that issues pertaining to the rights of indigenous peoples were outside the scope of the current topic and the fact that indigenous peoples had a special relationship with their land and the living environment did not justify addressing this matter. In addition, the content of draft principle IV-1 was not relevant to the current topic; it simply did not deal with damage from armed conflicts as it relates to indigenous peoples. Instead, the matter had been tackled from a human rights perspective that failed to address the reasoning behind the need to touch upon this issue. Several other members acknowledged that the question had been analysed from a very narrow perspective in the report, which did not do justice to the issue. While recognizing both this and that the content of draft principle IV-1 did not properly address the issue at hand, they nevertheless considered it important to reflect the situation of indigenous peoples in the draft principles. They emphasized that those peoples were particularly vulnerable to external interference and therefore needed special consideration with regard to the protection of their environment, including in relation to armed conflicts. In this regard, reference was made to pertinent provisions contained in the United Nations Declaration on the Rights of Indigenous Peoples[1313] and the American Declaration on the Rights of Indigenous Peoples.[1314] Instead of excluding the issue entirely, the draft principle should be redrafted to focus on the need to protect the lands and the environment of indigenous peoples. It was also suggested that indigenous peoples are particularly affected by, and have an important role to play in, post-conflict remediation efforts. The draft principle should therefore focus on this phase and relate more specifically to obligations of States in dealing with the environmental consequences of armed conflict. The view was also expressed that the question could possibly be dealt with in the context of draft principle I-(x) on protected zones, which the Commission had taken note of last year.[1315] It was suggested that the draft principle on the rights of indigenous peoples was relevant for all three temporal phases and should therefore be placed in a part containing "general principles".

(j) Future programme of work

178. Some members reiterated the importance they attached to this topic and expressed their strong desire to see it continue in the next quinquennium, noting that the Special

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[1313] General Assembly resolution 61/295 of 13 September 2007.

[1314] Organization of American States, AG/RES. 2888 (XLVI-O/16), of 15 June 2016.

[1315] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 134.

Rapporteur was about to end her term with the Commission. Regarding specific issues to be considered in the future, several members stressed the importance of addressing questions concerning responsibility, liability and compensation in the context of the draft principles. The point was also made, however, that an attempt to include these issues in the draft principles might render the outcome much more prescriptive. Some members agreed with the Special Rapporteur's view that it may be pertinent to examine the question of occupation. In addition, some members observed that questions on responsibility of non-State actors and organized armed groups and non-international armed conflicts might also be of interest. In this regard, it was nevertheless observed that the current draft principles seemed to already include non-international armed conflicts within their scope, which therefore raised the question if, pending such future consideration, this would impact on work already undertaken. It was further suggested that a draft principle should be included acknowledging that States should carefully test new weapons and prepare adequate military manuals in anticipation of future armed conflicts. Furthermore, the view was expressed that it may be useful to examine how the environment was factored in the activities of various financial and investment institutions, such as the International Centre for Settlement of Investment Disputes, the Multilateral Investment Guarantee Agency and the International Finance Corporation, in particular whether damage to the environment could be insured.

179. Some members agreed with the Special Rapporteur that it would be valuable for the Commission to continue consultations with other entities, such as ICRC, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and UNEP, as well as regional organizations. They also agreed that it would be useful if States would continue to provide examples of legislation and relevant case law.

3. Concluding remarks of the Special Rapporteur

180. In light of the comments made during the plenary debate concerning the methodology of the report and the topic at large, the Special Rapporteur considered it useful to clarify that the temporal division of the topic had been employed to facilitate the research and analysis of the topic given its extensive nature. She agreed that maintaining the arrangement of draft principles under temporal headings, which stemmed from work undertaken in the Drafting Committee, reflected in the outcome of the work posed substantive problems since, as had been noted in the debate, several of the draft principles were relevant to more than one phase. Should the Commission decide to reflect the temporal division in the draft principles, it would be appropriate to insert a separate part entitled "Principles of general application" at the very beginning. This part would replace the tentatively entitled "Part Four — [Additional principles]". She was convinced that the concerns expressed over the temporal boundaries could be addressed in the Drafting Committee.

181. With regard to the comments on the adequacy of some of the research contained in the report and also its relevance for the topic, the Special Rapporteur noted that the protection of the environment in relation to armed conflicts was a new area of legal development. It was therefore important to show how environmental concerns in this context were increasingly reflected in different legal fields, sometimes in ways that could be perceived as only indirectly relevant to the topic. This was particularly evident in the case law concerning environmental damage, which often took detours and seemed to address property or human rights only, as this constituted a more viable legal argument. Another area of the report that had generated similar criticism pertained to the section on investment agreements. Referring to the Commission's articles on the effects of armed conflicts on treaties, the Special Rapporteur recalled that investment agreements are part of

a group of treaties[1316] that have an implication of continued operation during armed conflict. They therefore served to illustrate that environmental protection is incorporated into treaties that may continue to operate during armed conflict. The Special Rapporteur maintained that these issues were both important and relevant for the development of the topic. She further stressed that the topic was not limited to the protection of the environment during armed conflict; its entire rationale was also to address other areas of international law and not remain limited to the law of armed conflict. The title of the topic clearly underlined this point. However, the Special Rapporteur acknowledged the criticism that the connection to the protection of the environment could be enhanced in several of the draft principles.

182. In response to comments that the section on future work was not sufficiently elaborated, the Special Rapporteur noted that she had found it more appropriate to simply highlight certain issues that the Commission may wish to consider since it would be for the next Special Rapporteur to decide on how to proceed.

183. The Special Rapporteur also addressed some of the comments concerning the draft principles. With regard to draft principle I-1, she recognized that it had been drafted in general terms, without specifying the various measures envisaged. This could be addressed by exemplifying some of the measures intended, either within the draft principle or in the commentaries.

184. In response to the comments questioning the relevance of status of forces and status of mission agreements, in draft principle I-3, the Special Rapporteur reiterated that the topic was not limited to address the phase during armed conflict and observed that such agreements may address issues that are vital for the protection of the environment. In this regard, the marking, reconstruction and preventive measures to deal with toxic substances were mentioned as relevant examples. Turning to draft principle I-4, the Special Rapporteur observed that the idea of addressing peace operations in the draft principles seemed to have garnered general support. However, in relation to the concern expressed that including peacekeeping missions in the scope of the topic may portray its engagement as armed conflict, she once again emphasized that the draft principles were not confined to situations of armed conflict but also covered the pre- and post-conflict phases. She also recalled that international humanitarian law applies to such missions.

185. With regard to draft principles III-3 and III-4 on remnants of war, the Special Rapporteur noted that comments on them had related to the exhaustiveness of the list of remnants of war referred to therein, allocation of responsibility for their removal, the temporal aspect of the draft provisions and the political realties with regard to their implementation. Concerning the types of remnants referred to in draft principle III-3, she observed that the draft principle reflected the law of armed conflict as it currently stands. Nevertheless, she welcomed suggestions to revisit the issue to ensure that other toxic and hazardous remnants were also covered. The Special Rapporteur also clarified that the allocation of responsibility for removing remnants of war was regulated by the law of armed conflict and had therefore not been addressed in the draft principles. Furthermore, the relevant legal provisions on this matter denoted that such responsibility was not limited to States but could be interpreted to also include other actors involved in a conflict. Regarding the temporal aspect of the draft principles, the Special Rapporteur recalled that they had been placed in the post-conflict phase and, as such, were intended to apply to this phase. Referring to the concerns raised that the words "without delay" included in draft

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[1316] Treaties of friendship, commerce and navigation and agreements concerning private rights (see the indicative list of treaties referred to in article 7, which appears in the annex to the draft articles, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. VI, sect. E).

principle III-3 would impose an unreasonable obligation on States, she noted that this expression was used in article 10 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.[1317]

186. Referring to the comments on the applicable phase of draft principle III-5, the Special Rapporteur was of the view that if the temporal headings were retained in the draft principles, this provision was best suited for post-conflict situations. She also observed that exceptions to the principle of granting access to and sharing of information for reasons of national security and defence could be reflected in the proposed provision, as had been suggested by some members. She noted, however, that while such exceptions were provided for in several existing legal instruments, this did not relieve parties from the obligation to cooperate in good faith.

187. The Special Rapporteur observed that draft principle IV-1 on rights of indigenous peoples had generated extensive comments, which had revealed divergent views among members on whether or not to address this issue in the context of the current topic. The Special Rapporteur remained convinced that this issue was highly pertinent for the topic and referred to various instruments where the connection between indigenous peoples with their environment had been emphasized and to instruments that demonstrated that this connection was particularly relevant in the context of armed conflict.[1318] She acknowledged, however, that this connection should be enhanced in the draft principle, which should not only clearly focus on the protection of the environment of indigenous peoples but also provide a direct link to situations of armed conflict.

C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission

1. Text of the draft principles

188. The text of the draft principles provisionally adopted so far by the Commission is reproduced below.

Draft principle 1
Scope

The present draft principles apply to the protection of the environment* before, during or after an armed conflict.

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* Whether the term "environment" or "natural environment" is preferable for all or some of these draft principles will be revisited at a later stage.

[1317] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.

[1318] United Nations Declaration on the Rights of Indigenous Peoples. General Assembly resolution 61/295 of 13 September 2007 and Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989), United Nations, *Treaty Series*, vol. 1650, No. 28383, p. 383.

Draft principle 2
Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

[…]

Part One
General principles

[…]

Draft principle 5 [I-(x)]
Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

[…]

[…]

Part Two
Principles applicable during armed conflict

Draft principle 9 [II-1]
General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.

3. No part of the natural environment may be attacked, unless it has become a military objective.

Draft principle 10 [II-2]
Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Draft principle 11 [II-3]
Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Draft principle 12 [II-4]
Prohibition of reprisals

Attacks against the natural environment by way of reprisals are prohibited.

Draft principle 13 [II-5]
Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

2. Text of the draft principles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

189. The text of the draft principles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

Protection of the environment in relation to armed conflicts

Introduction

(1) Structurally, the set of draft principles are divided into three parts following the initial part entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. Part One concerns guidance on the protection of the environment *before* the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for all three temporal phases: before, during and after an armed conflict. Additional draft principles will be added to this part at a later stage. Part Two pertains to the protection of the environment *during* armed conflict, and Part Three pertains to the protection of the environment *after* an armed conflict.

(2) The provisions have been cast as draft "principles" based on the understanding that the final form will be subject to consideration at a later stage. The intersection between the law relating to the environment and the law of armed conflict is inherent to the topic. It is for this reason that the principles are cast normatively at a general level of abstraction.[1319]

(3) The Commission has yet to formulate a preamble to accompany the draft principles. It is understood that a preamble, formulated in the usual manner, will be prepared at the appropriate time.

(4) In the preliminary report,[1320] the Special Rapporteur tentatively suggested definitions of the terms "armed conflict" and "environment" to be included in a "use of terms" provision, should the Commission decide to include such definitions. The Special Rapporteur also made it clear that she was not convinced of the need to adopt such a provision, particularly not at an early stage of the work. However, putting them forward served the purpose of illustrating some questions that might arise when defining these terms, and allowed the opportunity to take members' views on the matter into consideration.[1321] In her second report, the Special Rapporteur included the "use of terms" provision in the proposed draft principles,[1322] but requested that this particular provision not be sent to the Drafting Committee.[1323] Some members, including the Special Rapporteur, remained reluctant to include definitions, whereas others took the opposite view. In light of this, it was considered premature to delete it and the Special Rapporteur retained the proposal in order to evaluate the need for the provision in the light of subsequent discussions.

[1319] The Commission has previously chosen to formulate the outcome of its work as draft principles, for example in the draft principles on the allocation of loss in the case of transboundary harm arising from hazardous activities. See *Yearbook ... 2006*, vol. II (Part Two), draft principles on the allocation of loss in the case of transboundary harm arising from hazardous activities.

[1320] A/CN.4/674, paras. 78 and 86.

[1321] Introductory statement by the Special Rapporteur, 18 July 2014, at the 3227th meeting of the Commission (not reflected in the provisional summary record of the 3227th meeting (A/CN.4/SR.3227)).

[1322] A/CN.4/685, annex I.

[1323] Introductory statement by the Special Rapporteur, 6 July 2015, at the 3264th meeting of the Commission (partly reflected in the provisional summary record of the 3264th meeting (A/CN.4/SR.3264, p. 8)).

Draft principle 1
Scope

The present draft principles apply to the protection of the environment* before, during or after an armed conflict.

* Whether the term "environment" or "natural environment" is preferable for all or some of these draft principles will be revisited at a later stage.

Commentary

(1) This provision defines the scope of the draft principles. It provides that they cover three temporal phases: before, during and after armed conflict. It was viewed as important to signal quite early that the scope of the draft principles relates to these phases. The disjunctive "or" seeks to underline that not all draft principles would be applicable during all phases. However, this is worth emphasizing that there is, at times, a certain degree of overlap between these three phases. Furthermore, the formulation builds on discussions within the Commission and in the Sixth Committee of the General Assembly.[1324]

(2) The division of the principles into the temporal phases described above (albeit without strict dividing lines) sets out the *ratione temporis* of the draft principles. It was considered that addressing the topic from a temporal perspective rather than from the perspective of various areas of international law, such as international environmental law, the law of armed conflict and international human rights law, would make the topic more manageable and easier to delineate. The temporal phases would address legal measures taken to protect the environment before, during and after an armed conflict. Such an approach allowed the Commission to identify concrete legal issues relating to the topic that arose at the different stages of an armed conflict, which facilitated the development of the draft principles.[1325]

(3) Regarding the *ratione materiae* of the draft principles, reference is made to the term "protection of the environment" as it relates to the term "armed conflicts". No distinction is made between international armed conflicts and non-international armed conflicts.

(4) The asterisk attached to the term "environment" indicates that the Commission has not yet decided whether a definition of this term should be included in the text of the draft principles and, if so, whether the term to be defined should be the "natural environment" or simply the "environment".[1326]

Draft principle 2
Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

[1324] The topic was put on the long-term programme of work of the Commission in 2011 and moved onto the current programme of work in 2013, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), annex E, and *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10) para. 131.

[1325] See *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10) para. 135, and *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10) paras. 192-213.

[1326] The tentative proposal on the use of terms was referred to the Drafting Committee at the request of the Special Rapporteur on the understanding that the provision was referred for the purpose of facilitating discussions.

Commentary

(1) This provision outlines the fundamental purpose of the draft principles. It makes it clear that the draft principles aim to enhance the protection of the environment in relation to armed conflict, including through preventive measures (which aim to minimize damage to the environment during armed conflict) and also through remedial measures (which aim to restore the environment after damage has already been caused as a result of armed conflict). It should be noted that the purpose of the provision is reflected in the word "enhancing", which in this case should not be interpreted as an effort to progressively develop the law.

(2) The provision states the purpose of the draft principles, which would be subject of further elaboration in the ensuing principles. The reference to "including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures" is meant to signal the general kinds of measures that would be required to offer the necessary protection.

(3) Similar to the provision on scope, the present provision covers all three temporal phases. While it has been recognized both within the Commission[1327] and within the Sixth Committee of the General Assembly[1328] that the three phases are closely connected,[1329] the reference to "preventive measures for minimizing damage" relates primarily to the situation before and during armed conflict, and the reference to "remedial measures" in turn principally concerns the post-conflict phase. It should be noted that a State may take remedial measures to restore the environment even before the conflict has ended.

(4) The term "remedial measures" was preferred to the term "restorative measures" as it was viewed as clearer and broader in scope, encompassing any measure of remediation that may be taken to restore the environment. This might include, *inter alia*, loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures.

Part One
General principles

Draft principle 5 [I-(x)]
Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Commentary

(1) Draft principle 5 [I-(x)] is entitled "Designation of protected zones" and provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones. The term "protected zones" was employed as opposed to "demilitarized zones", as the latter term is amenable to different understandings. Part One ("General principles"), where this provision is placed, deals with the pre-conflict stage, when peace is prevailing, but also contain principles of a more general nature that are

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[1327] See e.g. A/CN.4/685, para. 18.

[1328] *Ibid.*, footnote 18, Norway (on behalf of the Nordic countries) (A/C.6/69/SR.25, para. 133), Portugal (A/C.6/69/SR.26, para. 6), Singapore (A/C.6/69/SR.26, para. 66), New Zealand (A/C.6/69/SR.27, para. 3) and Indonesia (A/C.6/69/SR.27, para. 67).

[1329] For example, remedial measures might be required during an occupation.

relevant to all three temporal phases. Draft principle 5 [I-(x)] therefore does not exclude instances in which such areas could be designated either during or soon after an armed conflict. It was recognized that there would be certain draft principles that cut across and straddle the various phases, and draft principle 5 [I-(x)] serves as an example of such a principle. In addition, draft principle 5 [I-(x)] has a corresponding draft principle (draft principle 13 [II-5]) which is placed in Part Two "Principles applicable during armed conflict".

(2) A State may already be taking the necessary measures to protect the environment in general. Such measures may include, in particular, preventive measures in the event that an armed conflict might occur. It is not uncommon that physical areas are assigned a special legal status as a means to protect and preserve a particular area. This can be done through international agreements or through national legislation. In some instances such areas are not only protected in peacetime, but are also immune from attack during an armed conflict.[1330] As a rule, this is the case with demilitarized and neutralized zones. It should be noted that the term "demilitarized zones" has a special meaning in the context of the law of armed conflict. Demilitarized zones are established by the parties to a conflict and imply that the parties are prohibited from extending their military operations to that zone if such an extension is contrary to the terms of their agreement.[1331] Demilitarized zones can also be established and implemented in peacetime.[1332] Such zones can cover various degrees of demilitarization, ranging from areas that are fully demilitarized to ones which are partially demilitarized, such as nuclear weapon free zones.[1333]

(3) When designating protected zones under this draft principle, particular weight should be given to the protection of areas of major environmental importance that are susceptible to the adverse consequences of hostilities.[1334] Granting special protection to areas of major ecological importance was suggested at the time of the drafting of the Additional Protocols to the Geneva Conventions.[1335] While the proposal was not adopted, it

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[1330] A/CN.4/685, para. 210.

[1331] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, art. 60. See also J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules*, vol. I (Cambridge, Cambridge University Press, 2005), p. 120. The ICRC study on customary law considers that this constitutes a rule under customary international law and is applicable in both international and non-international armed conflicts.

[1332] See e.g. Antarctic Treaty, done in Washington on 1 December 1959 (United Nations, *Treaty Series*, vol. 402, No. 5778), art. I. See e.g., the definition found in M. Björklund and A. Rosas, *Ålandsöarnas Demilitarisering och Neutralisering* (Åbo, Åbo Academy Press, 1990). The Åland Islands are both demilitarized and neutralized. Björklund and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan (see p. 17). See also L. Hannikainen, "The Continued Validity of the Demilitarized and Neutralized Status of the Åland Islands" *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 54 (1994), p. 616.

[1333] *Ibid.*

[1334] See A/CN.4/685, para. 225. See also C. Droege and M.-L. Tougas, "The Protection of the Natural Environment in Armed Conflict — Existing Rules and Need for Further Legal Protection", *Nordic Journal of International Law*, vol. 82 (2013), p. 43.

[1335] The working group of Committee III of the Conference submitted a proposal for a draft article 48*ter* providing that "publicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes". See C. Pilloud and J. Pictet, "Article 55: Protection of the Natural Environment" in *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B. Zimmerman, eds. (Geneva, Martinus Nijhoff, 1987), p. 664, paras. 2138-2139.

should be recognized that it was formulated in the infancy of international environmental law. Other types of zones are also relevant in this context, and will be discussed below.

(4) The areas referred to in this draft principle may be designated by agreement or otherwise. The reference to "agreement or otherwise" is intended to introduce some flexibility. The types of situations foreseen may include, *inter alia*, an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. It should be noted that the reference to the word "State" does not preclude the possibility of agreements being concluded with non-State actors. The area declared has to be of "major environmental and cultural importance". The formulation leaves open the precise meaning of this requirement on purpose, to allow room for interpretation. While the designation of protected zones could take place at any time, it should preferably be before or at least at the outset of an armed conflict.

(5) It goes without saying that under international law, an agreement cannot bind a third party without its consent.[1336] Thus two States cannot designate a protected area in a third State. The fact that States cannot regulate areas outside their sovereignty or mandate of jurisdiction in a manner that is binding on third States, whether through agreements or otherwise, was also outlined in the second report of the Special Rapporteur.[1337]

(6) Different views were initially expressed as to whether or not the word "cultural" should be included. Ultimately, the Commission opted for the inclusion of the term. It was noted that it is sometimes difficult to draw a clear line between areas which are of environmental importance and areas which are of cultural importance. This is also recognized in the Convention concerning the Protection of the World Cultural and Natural Heritage (hereafter the World Heritage Convention).[1338] The fact that the heritage sites under this Convention are selected on the basis of a set of ten criteria, including both cultural and natural (without differentiating between them) illustrates this point.[1339]

(7) It should be recalled that prior to an armed conflict, States parties to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict[1340] (hereafter the 1954 Hague Convention) and its Protocols, are under the obligation to establish inventories of cultural property items that they wish to enjoy protection in the case of an armed conflict, in accordance with article 11, paragraph 1, of the 1999 Protocol to the Convention.[1341] In peacetime, State parties are required to take other measures that they find appropriate to protect their cultural property from anticipated adverse impacts of armed conflicts, in accordance with article 3 of the Convention.

[1336] As recognized by the Permanent Court in the case concerning the *Factory At Chorzów, P.C.I.J., Series A, No. 17*, p. 45 and reflected in article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[1337] A/CN.4/685, para. 218.

[1338] Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972), United Nations, *Treaty Series*, vol. 1037, No. 15511, p. 151.

[1339] UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (8 July 2015) WHC.15/01, para. 77.1. At present, 197 sites representing natural heritage across the world are listed on the World Heritage List. A number of these also feature on the List of World Heritage in Danger in accordance with art. 11(4) of the World Heritage Convention.

[1340] Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 240.

[1341] Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) (The Hague, 26 March 1999) *ibid*, vol. 2253, No. 3511, p. 172.

(8) The purpose of the present draft principle is not to affect the regime of the 1954 Hague Convention, which is separate in its scope and purpose. The Commission underlines that the 1954 Hague Convention including its additional protocols are the special regime that governs the protection of cultural property both in times of peace, and during armed conflict. It is not the intention of the present draft principle to replicate that regime. The idea here is to protect areas of major "environmental importance". The reference to the term "cultural" is intended to infer the existence of a close linkage to the environment. In this context, it should be noted though that the draft principle does not extend to cultural objects *per se*. The term would however include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

(9) The designation of the areas foreseen by this draft principle can be related to the rights of indigenous peoples, particularly if the protected area also serves as a sacred area which warrants special protection. In some cases, the protected area may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living inside the area concerned. The importance of preserving indigenous culture and knowledge has now been formally recognised in international law under the Convention on Biological Diversity (CBD).[1342] Article 8 (j) states that each Contracting Party shall, as far as possible and as appropriate: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices". In addition, the United Nations Declaration on the Rights of Indigenous Peoples,[1343] although not a binding instrument, refers to the right to manage, access and protect religious and cultural sites.

(10) The protection of the natural environment as such and the protection of sites of cultural and natural importance sometimes correspond or overlap. The term "cultural importance", which is also used in draft principle 13 [II-5], builds on the recognition of the close connection between the natural environment, cultural objects and characteristics in the landscape in environmental protection instruments such as the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted under Council of Europe).[1344] Article 2, paragraph 10, defines the term "environment" for the purpose of the Convention to include: "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of cultural heritage; and characteristic aspects of the landscape". In addition, article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that "effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction

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[1342] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), *ibid.*, vol. 1760, No. 30619), p. 79.

[1343] General Assembly resolution 61/295, annex, art. 12.

[1344] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Council of Europe, *European Treaty Series*, No. 150. For more information on the applicability of multilateral environmental agreements in connection to areas of particular environmental interest, see B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (PhD thesis, Lund University 2016).

among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".[1345]

(11) Moreover, the CBD speaks to the cultural value of biodiversity. The preamble of the CBD reaffirms that the parties are: "Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components."[1346] Similarly, the first paragraph of annex I to the CBD highlights the importance of ensuring protection for ecosystems and habitats "containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes".

(12) In addition to these binding instruments, a number of non-binding instruments use a lens of cultural importance and value to define protected areas. For instance, the draft convention on the prohibition of hostile military activities in internationally protected areas (prepared by the IUCN Commission on Environmental Law and the International Council of Environmental Law) defines the term "protected areas" as follows: "natural or cultural area [*sic*] of outstanding international significance from the points of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or intergovernmental programme which meet these criteria".[1347]

(13) A few examples of domestic legislation referring to the protection of both cultural and environmental areas can also be mentioned in this context. For example, Japan's Act on the Protection of Cultural Property of 29 August 1950, provides for animals and plants which have a high scientific value to be listed as "protected cultural property".[1348] The National Parks and Wildlife Act of 1974 of New South Wales in Australia may apply to any area of natural, scientific or cultural significance.[1349] Finally, the Italian Protected Areas Act of 6 December 1991 defines "nature parks" as areas of natural and environmental value constituting homogeneous systems characterised by their natural components, their landscape and aesthetic values and the cultural tradition of the local populations.[1350]

Part Two
Principles applicable during armed conflict

Draft principle 9 [II-1]
General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

[1345] Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269.

[1346] Convention on Biological Diversity, preamble.

[1347] International Union for Conservation of Nature, draft convention on the prohibition of hostile military activities in internationally protected areas (1996), art. 1.

[1348] Japan, Law for the Protection of Cultural Property, Law No. 214, May 30, 1950. Available from www.unesco.org/culture/natlaws/media/pdf/japan/japan_lawprotectionculturalproperty_engtof.pdf (accessed on 28 July 2016).

[1349] New South Wales Consolidated Acts, *National Parks and Wildlife Act*, Act 80 of 1974. Available from www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/ (accessed on 28 July 2016).

[1350] Italy, Act No. 394 laying down the legal framework for protected areas, 6 December 1991, available from http://faolex.fao.org.

2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.

3. No part of the natural environment may be attacked, unless it has become a military objective.

Commentary

(1) Draft principle 9 [II-1] comprises three paragraphs which broadly provide for the protection of the natural environment during armed conflict. It reflects the obligation to respect and protect the natural environment, the duty of care and the prohibition of attacks against any part of the environment, unless it has become a military objective.

(2) Paragraph 1 sets out the general position that in relation to armed conflict, the natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. It is recalled that the Commission has not yet decided whether a definition of the term "environment" should be included in the text of the draft principles, and if so, whether the term to be defined should be the "natural environment" or simply the "environment" . It should be noted that Part II, where draft principle 9 [II-1] is placed, addresses situations during armed conflict, and that treaties on the law of armed conflict often refer to the "natural environment" as distinct from the "environment".[1351]

(3) The words "respected" and "protected" were considered fitting for use in this draft principle as they have been used in several international environmental law and international human rights law instruments to date.[1352] The International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that "respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity" and that States have a duty "to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[1353]

(4) As far as the use of the term "law of armed conflict" is concerned, it should be emphasized that traditionally there was a distinction between the terms "law of armed

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[1351] See Protocol I, arts. 35 and 55. The ICRC Commentary on article 55 of Additional Protocol I to the Geneva Conventions advocates that the "natural environment" should be understood in a wide sense as covering the biological environment in which a population is living. See Pilloud and Pictet (footnote 1335 above), p. 662, the "natural environment" "does not consist merely of the objects indispensable to survival ... but also includes forests and other vegetation ... as well as fauna, flora and other biological or climatic elements".

[1352] A considerable number of instruments on the law of armed conflict, environmental law and human rights law which contain the terms "respect" and "protect". Of most relevance is the World Charter of Nature, United Nations General Assembly resolution 37/7 of 28 October 1982, in particular the preamble and principle 1 and Protocol I to the 1949 Geneva Conventions, art. 48, para. 1, which provides that civilian objects shall be respected and protected. See also, for example, the International Covenant on Civil and Political Rights (New York, 16 December 1964), United Nations, *Treaty Series*, vol. 999, p. 171, art. 2; Protocol I to the 1949 Geneva Conventions, art.55, and the Rio Declaration on Environment and Development (Rio Declaration), *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, principle 10.

[1353] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996*, p. 226, at paras. 30 and 63.

conflict" and "international humanitarian law".[1354] International humanitarian law could be viewed narrowly as only referring to part of the law of armed conflict which aims at protecting victims of armed conflict; whereas the law of armed conflict can be seen as more of an umbrella term covering the protection of victims of armed conflict as well as regulating the means and methods of war.[1355] The terms are increasingly seen as synonyms in international law.[1356] However, the term "law of armed conflict" was preferred due to its broader meaning and to ensure consistency with the Commission's previous work on the draft articles on effects of armed conflict on treaties, in which context it was pointed out that the law of armed conflict also clearly includes the law of occupation and the law of neutrality.[1357] The relationship between the present topic and the topic on the effects of armed conflict on treaties should be emphasized.

(5) As far as the term "applicable international law" is concerned, it must be noted that the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection remain relevant.[1358] Paragraph 1 of draft principle 9 [II-1] is therefore relevant during all three phases (before, during and after armed conflict) to the extent that the law of armed conflict applies. This paragraph highlights the fact that the draft principles are intended to build on existing references to the protection of the environment in the law of armed conflict together with other rules of international law in order to enhance the protection of the environment in relation to armed conflict overall.

(6) Paragraph 2 is inspired by article 55 of Additional Protocol I, which provides the rule that care shall be taken to protect the environment against widespread, long term and severe damage in international armed conflicts.[1359] The term "care shall be taken" should be interpreted as indicating that there is a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the natural environment.[1360]

(7) Similar to article 55, draft principle 9 [II-1] also adopts the use of the word "and" which indicates a triple cumulative standard. However, draft principle 9 [II-1] differs from article 55 as regards applicability and generality. First, draft principle 9 [II-1] does not make a distinction between international and non-international armed conflicts, with the understanding that the draft principles are aimed at applying to all armed conflicts.[1361] This

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[1354] For a description of the semantics, see Y. Dinstein (ed), *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge, Cambridge University Press, 2010), at paras. 35-37 and 41-43.

[1355] See e.g., R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford, Hart Publishing, 2008), pp. 16 and 17.

[1356] *Ibid.*

[1357] *Official Records of the General Assembly, Sixty-Sixth Session, Supplement No. 10* (A/66/10), Commentary on art. 2, p. 182.

[1358] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1353 above), paras. 25 and 27-30.

[1359] Article 55 – Protection of the natural environment reads:

> "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."
>
> 2. Attacks against the natural environment by way of reprisals are prohibited."

[1360] Pilloud and Pictet (see footnote 1335 above), p. 663. See also K. Hulme, "Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?" in *International Review of the Red Cross*, vol. 92, No. 879 (2010), pp. 675-691.

[1361] See preliminary report on the protection of the environment in relation to armed conflicts, A/CN.4/674, p. 21.

includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, as well as armed conflicts in which peoples are fighting against colonial domination, alien occupation and against racist régimes in the exercise of their right of self-determination; as well as non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State (thus without the involvement of a State).[1362]

(8) The terms "widespread", "long-term" and "severe" are not defined in Additional Protocol I. The same terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).[1363] However, it must be kept in mind that ENMOD does not contain the triple cumulative requirement as required by Additional Protocol I, as it uses the word "or" instead of "and", and also that the context of the ENMOD is far narrower than Additional Protocol I.

(9) Second, draft principle 9 [II-1] differs from article 55 of Additional Protocol I in that it is of a more general nature. Unlike article 55, draft principle 9 [II- 1] does not explicitly prohibit the use of methods or means of warfare which are intended or may be expected to cause damage to the natural environment and thereby prejudice the health or survival of the population. At the time of drafting, concerns were raised that this exclusion may weaken the text of the draft principles. However, the general nature of the draft principles needs to be stressed. The draft principles do not aim to reformulate rules and principles which already exist and are recognized by the law of armed conflict. In addition, paragraph 2 should be read together with draft principle 10 [II-2], which deals with the application of principles and rules of the law of armed conflict to the natural environment with the aim of providing environmental protection.

(10) It must also be stressed here that article 36 of Additional Protocol I requires States to review new weapons and means and methods of warfare to ensure that they do not contravene existing rules of international law, and is applicable to all weapons.[1364] This requirement could be addressed in connection with a forthcoming draft principle.

[1362] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), *ibid.*, vol. 75, No. 970, p. 31, art. 49 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85, art. 50 ("Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135, art. 129 ("Geneva Convention III"); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287, art. 146 ("Geneva Convention IV"), common articles 2 and 3; Protocol I, art. 1; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *ibid.*, No. 17513, p. 609, art 1.

[1363] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) (New York, 10 December 1976), *ibid.*, vol.1108, No. 17119, p. 151, art.2. In terms the Understanding to article 2, the terms "widespread", "long-term" and "severe" are understood as follows: "'widespread': encompassing an area on the scale of several hundred square kilometers"; "'long-lasting': lasting for a period of months, or approximately a season"; "'severe': involving serious or significant disruption or harm to human life, natural and economic resources or other assets" (*Report of the Conference of the Committee on Disarmament, Official Records of the General Assembly, Thirty-first Session, Supplement No. 27* (A/31/27), vol. I, pp. 91-92).

[1364] See e.g. K. Lawend, "Reviewing the Legality of New Weapons, Means and Methods of Warfare" *International Review of the Red Cross*, vol. 88, No. 864 (2006), p. 925; J. McClelland, "The Review of Weapons in Accordance with Article 36 of Additional Protocol I" *International Review of the Red Cross*, vol. 85, No. 850 (2003), p. 397; UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi, UNEP, 2009), p. 16.

(11) Paragraph 3 of draft principle 9 [II-1] seeks to treat the natural environment in the same way as a civilian object during armed conflict. This paragraph is based on the fundamental rule that a distinction must be made between military objectives and civilian objects.[1365]

(12) Paragraph 3 of draft principle 9 [II-1] can be linked to article 52(2) of Additional Protocol I, which defines the term "military objective" as:

> "… [T]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[1366]

The term "civilian object" is defined as "all objects which are not military objectives".[1367] In terms of the law of armed conflict, attacks may only be directed against military objectives, and not civilian objects.[1368] There are several binding and non-binding instruments which indicate that this rule is applicable to the natural environment.[1369]

[1365] See in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), at pp. 25-29 and 143.

[1366] Protocol I to the 1949 Geneva Conventions, art. 52, para. 2. A similar definition is provided in the following protocols to the Convention on Certain Conventional Weapons: Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the Convention on Certain Conventional Weapons (Geneva, 10 October 1980) (Protocol II to the Convention on Certain Conventional Weapons), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, at p. 168; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996), *ibid.*, vol. 2048, No. 22495, p. 93 and Protocol III (on Prohibitions or Restrictions on the Use of Incendiary Weapons, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol III to the Convention on Certain Conventional Weapons), *ibid.*, vol. 1342, No. 22495, p. 171 as well as the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) (The Hague, 26 March 1999), *ibid.*, vol. 2253, No. 3511, p. 172 .

[1367] See art. 52, para 1 of Protocol I to the 1949 Geneva Conventions, as well as art. 2, para. 5 of the Protocol II to the Convention on Certain Conventional Weapons; art. 2, para. 7, of the amended Protocol II to the Convention on Certain Conventional Weapons and art. 1, para. 4, of the Protocol III to the Convention on Certain Conventional Weapons.

[1368] See in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), rule 7, pp. 25-29. The principle of distinction is codified, *inter alia*, in article 48 and 52(2) of Additional Protocol I, as well as the Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons. It is recognized as a rule of customary international humanitarian law in both international and non-international armed conflict.

[1369] These instruments have been cited as, *inter alia*, art. 2, para. 4, of Protocol III to the Convention on Certain Conventional Weapons; the Guidelines on the Protection of the Environment in Times of Armed Conflict, the Final Declaration adopted by the International Conference for the Protection of War Victims, United Nations General Assembly resolutions 49/50 and 51/157, annex, the military manuals of Australia and the United States, as well as national legislations of Nicaragua and Spain. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), pp. 143 and 144.

(13) Paragraph 3 is, however, temporally qualified with the words "has become", which emphasizes that this rule is not absolute: the environment may become a military objective in certain instances, and could thus be lawfully targeted.[1370]

(14) Paragraph 3 is based on the first paragraph of rule 43 of the ICRC Customary International Law Study. However, the other parts of rule 43 were not included in its current formulation, which raised some concerns. In this regard, it is once again useful to reiterate that the draft principles are general in nature and that they do not aim to reformulate rules and principles already recognized by the law of armed conflict. Accordingly, both paragraph 2 and paragraph 3 must be read together with draft principle 10 [II-2], which specifically references the application of the law of armed conflict rules and principles of distinction, proportionality, military necessity and precautions in attack.

(15) It can be seen that draft principle 9 [II-1] tries to strike a balance between creating guiding principles for the protection of the environment in relation to armed conflict without reformulating rules and principles already recognized by the law of armed conflict.

Draft principle 10 [II-2]
Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Commentary

(1) Draft principle 10 [II-2] is entitled "Application of the law of armed conflict to the natural environment" and deals with the application of principles and rules of the law of armed conflict to the natural environment with a view to its protection. Draft principle 10 [II-2] is placed in Part Two of the draft principles (Principles applicable *during* armed conflict), illustrating that it is intended to apply during armed conflict. The overall aim of the draft principle is to strengthen the protection of the environment in relation to armed conflict, and not to reaffirm the law of armed conflict.

(2) The words "law of armed conflict" were chosen instead of "international humanitarian law" for the same reasons explained in the commentary on draft principle 9 [II-1]. The use of this term also highlights the fact that draft principle 10 [II-2] deals exclusively with the law of armed conflict as *lex specialis*, and not other branches of international law.

(3) Draft principle 10 [II-2] lists some specific principles and rules of the law of armed conflict, namely the principles and rules of distinction, proportionality, military necessity

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[1370] See e.g. M. Bothe, "International law protecting the environment during armed conflict: gaps and opportunities" *International Review of the Red Cross*, vol. 92 (2010), p. 576; R. Rayfuse, "Introduction" in *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, R. Rayfuse (ed) (Leiden, Brill Nijhoff, 2015) p. 6; see also C. Droege and M.-L. Tougas, "The protection of the natural environment in armed conflict-existing rules and need for further legal protection", *ibid.*, pp. 17-19; D. Fleck, "The protection of the environment in armed conflict: legal obligations in the absence of specific rules", *ibid.*, pp. 47-52; E. Koppe, "The principle of ambiguity and the prohibition against excessive collateral damage to the environment during armed conflict", *ibid.*, pp. 76-82; and M. Bothe, "The ethics, principles and objectives of protection of the environment in times of armed conflict", *ibid.*, p. 99.

and precautions in attack.[1371] The draft principle itself is of a general character and does not elaborate as to how the principles and rules should be interpreted, as they are well-established principles and rules under the law of armed conflict and it is not the aim of the draft principles to interpret them. They are explicitly included in draft principle 10 [II-2] because they have been identified as being the most relevant principles and rules relating to the protection of the environment in relation to armed conflict.[1372] However, their reference should not be interpreted as indicating a closed list, as all other rules under the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.[1373]

(4) One of the cornerstones of the law of armed conflict[1374] is the principle of distinction which obliges parties to an armed conflict to distinguish between civilian objects and military objectives at all times, and that attacks may only be directed against military objectives.[1375] This is considered a rule under customary international law, applicable in both international and non-international armed conflict.[1376] As explained in the commentary on draft principle 9 [II-1], the natural environment is not intrinsically military in nature and should be treated as a civilian object. However, there are certain circumstances in which parts of the environment may become a military objective, in which case such parts may be lawfully targeted.

(5) The principle of proportionality establishes that an attack against a legitimate military target is prohibited if it may be expected to cause incidental damage to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.[1377]

[1371] The reference to the rule of military necessity rather than to the principle of necessity reflects the view of some States that military necessity is not a general exemption, but needs to have its basis in an international treaty provision.

[1372] See R. Rayfuse, "Rethinking international law and the protection of the environment in relation to armed conflict" in *War and the Environment* ..., Rayfuse (ed.) (footnote 1370 above), p. 6; UNEP, *Protecting the Environment During Armed Conflict*... (footnote 1364 above), pp. 12 and 13.

[1373] These include, *inter alia*, arts. 35 and 55 of Protocol I to the 1949 Geneva Conventions. Other provisions of Protocol I and Protocol II, as well as other instruments of the law of armed conflict which may indirectly contribute to protecting the environment such as those prohibiting attacks against works and installations containing dangerous forces (Protocol I, art. 56; Protocol II, art. 15), those prohibiting attacking objects indispensable to the civilian population (Protocol I, art. 54; Protocol II, art. 14); the prohibition against pillage (Regulations respecting the laws and customs of war on land (The Hague, 18 October 1907), art. 28); Protocol II, art. 4, para. 2(g) and the prohibition on the forced movement of civilians (Protocol II, art. 17). See also UNEP, *Environmental Considerations of Human Displacement in Liberia: A Guide for Decision Makers and Practitioners* (2006).

[1374] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996*, p. 226, at para. 257; M. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance" *Virginia Journal of International Law*, vol. 50 (2010), p 803.

[1375] The principle of distinction is now codified in arts. 48, 51, para. 2 and 52, para. 2 of Protocol I; art. 13, para. 2 of Protocol II to the 1949 Geneva Conventions; Amended Protocol II to the Convention on Certain Conventional Weapons; Protocol III to the Convention on Certain Conventional Weapons; and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

[1376] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), at p. 25.

[1377] Art. 51, para. 5 (b) of Protocol I to the 1949 Geneva Conventions. See also See also Yoram Dinstein, "Protection of the environment in international armed conflict" *Max Planck Yearbook of United Nations Law*, vol. 5 (2001), p. 523, at pp. 524-525. See also L. Doswald-Beck, "International

(6) The principle of proportionality is an important rule under the law of armed conflict also because of its relation to the rule of military necessity.[1378] It is codified in several instruments of the law of armed conflict, and the International Court of Justice has also recognized its applicability in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.[1379] It is considered a rule under customary international law, applicable in both international and non-international armed conflict.[1380]

(7) As the environment is often indirectly rather than directly affected by armed conflict, rules relating to proportionality are of particular importance in relation to the protection of the natural environment in armed conflict.[1381] The particular importance of the principle of proportionality in relation to the protection of the natural environment in armed conflict has been emphasized by the ICRC customary law study, which found that the potential effect of an attack on the environment needs to be assessed.[1382]

(8) If the rules relating to proportionality are applied in relation to the protection of the natural environment, it means that attacks against legitimate military objectives must be refrained from if such an attack would have incidental environmental effects that exceed the value of the military objective in question.[1383] On the other hand though, the application of the rule also means that "if the target is sufficiently important, a greater degree of risk to the environment may be justified".[1384] It therefore accepts that "collateral damage" to the natural environment may be lawful in certain instances.

(9) Under the law of armed conflict, military necessity allows "measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited".[1385] It means that an attack against a legitimate military objective which may have negative environmental effects will only be allowed if such an attack is actually necessary to accomplish a specific military purpose and is not covered by the prohibition

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humanitarian law and the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" *International Review of the Red Cross*, vol. 37 (1997), p. 52.

[1378] Schmitt, "Military necessity and humanity ..." (footnote 1374 above), p. 804.

[1379] Protocol I, arts. 51 and 57, Protocol II to the 1949 Geneva Conventions, and Amended Protocol II to the Convention on Certain Conventional Weapons as well as the Statute of the International Criminal Court, art. 8, para. 2 (b)(iv). See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996*, p. 296, at para. 30.

[1380] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), p. 46.

[1381] *Ibid.*, p. 150; Droege and Tougas, "The protection of the natural environment in armed conflict ..." (footnote 1370 above), p. 19, see also UNEP, *Desk Study on the Environment in Liberia* (UNEP, 2004) and UNEP, *Environmental Considerations of Human Displacement in Liberia* ... (footnote 1373 above).

[1382] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), rule 44, p. 150.

[1383] See also Dinstein, "Protection of the environment ..." (footnote 1377 above), pp. 524-525; Doswald-Beck, "International humanitarian law and the advisory opinion of the International Court of Justice ..." (footnote 1377 above); UNEP, *Protecting the Environment During Armed Conflict* ... (footnote 1364 above), p. 13; Rayfuse, introduction in *War and the Environment* ... (footnote 1370 above), p. 6; Droege and Tougas, "The protection of the natural environment ..." (footnote 1370 above), pp. 19-23.

[1384] International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, at para. 19. Available from http://www.icty.org/x/file/Press/nato061300.pdf. See also Dinstein, "Protection of the environment ..." (footnote 1377 above), at pp. 524 and 525.

[1385] M. Sassoli, A. Bouvier and A. Quintin, "How does law protect in war: online glossary". Available from www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm (accessed on 28 July 2016).

against the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,[1386] or does not meet the criteria contained in the principle of proportionality.[1387]

(10) The rule concerning precautions in attack lays out that care must be taken to spare the civilian population, civilians and civilian objects from harm during military operations; and also that all feasible precautions must be taken to avoid and minimize incidental loss of civilian life, injury to civilians as well as damage to civilian objects which may occur. The rule is codified in several instruments of the law of armed conflict[1388] and is also considered to be a customary international law rule in both international and non-international armed conflict.[1389]

(11) The fundamental rule concerning precautions in attack obliges parties to an armed conflict to take necessary and active precautions in planning and deciding an attack. Therefore in relation to the protection of the environment, it means that parties to an armed conflict are obliged to take all feasible precautions to avoid and minimize collateral environmental damage.[1390]

(12) Lastly, the words "shall be applied to the natural environment, with a view to its protection" introduces an objective which those involved in armed conflict or military operations should strive towards, and thus it goes further than simply affirming the application of the rules of armed conflict to the environment.

Draft principle 11 [II-3]
Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Commentary

(1) Draft principle 11 [II-3] is entitled "Environmental considerations" and provides that environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

(2) The text is drawn from and inspired by the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, which held that: "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality".[1391]

(3) Draft principle 11 [II-3] is closely linked with draft principle 10 [II-2]. The added value of this draft principle in relation to draft principle 10 [II-2] is that it provides

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[1386] Protocol I, art. 35, para. 3.

[1387] *Ibid.*, art. 51, para. 5 (b).

[1388] The principle of precautions in attack is codified in art. 2, para. 3 of the Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907); art. 57, para. 1, of Protocol I to the 1949 Geneva Conventions, as well as Amended Protocol II to the Convention on Certain Conventional Weapons, and the Second Protocol to The Hague Convention for the Protection of Cultural Property.

[1389] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), rule 15.

[1390] *Ibid.*, rule 44.

[1391] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996*, p. 226, at para. 30.

specificity with regard to the application of the principle of proportionality and the rules of military necessity. It is therefore of operational importance. However, some members suggested that it should be deleted altogether.

(4) Draft principle 11 [II-3] aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such. This is already regulated under the law of armed conflict, and is often reflected in military manuals and domestic law of States.[1392] The words "*when applying* the principle" were specifically chosen to make this point clear. Also for purposes of clarity and in order to emphasize the link between draft principles 10 [II-2] and 11 [II-3], it was decided to refer explicitly to the principle of proportionality and rules on military necessity. These principles have been discussed in the commentary to draft principle 10 [II-2] above.

(5) Draft principle 11 [II-3] becomes relevant once the legitimate military objective has been identified. Since knowledge of the environment and its eco-systems is constantly increasing, better understood and more widely accessible to humans, it means that environmental considerations cannot remain static over time, they should develop as human understanding of the environment develops.

Draft principle 12 [II-4]
Prohibition of reprisals

Attacks against the natural environment by way of reprisals are prohibited.

Commentary

(1) Draft principle 12 [II-4] is entitled "Prohibition of reprisals" and is a mirror image of paragraph 2 of article 55 of Additional Protocol I.

(2) Although the draft principle on the prohibition of reprisals against the natural environment was welcomed and supported by some members, other members raised several issues concerning its formulation and were of the view that it should not have been included in the draft principles at all. The divergent views centred around three main points: a) the link between draft principle 12 [II-4] and article 51 of Additional Protocol I; b) whether or not the prohibition of reprisals against the environment reflected customary law; and c) if so, whether both international and non-international armed conflicts were covered by such a customary law rule.

(3) Those who expressed support for the inclusion of the draft principle stressed the link between draft principle 12 [II-4] and article 51 of Additional Protocol I. In their view, article 51 (which is placed under the section "General protection against effects of hostilities") is one of the most fundamental articles of Additional Protocol I. It codifies the customary rule that civilians must be protected against danger arising from hostilities, and, in particular, also provides that "attacks against the civilian population or civilians by way

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[1392] See Protocol I, arts. 48, 50, 51 (in particular para. 4), 52 (in particular para. 2) and 57(2) and Protocol II, art. 13(2) to the 1949 Geneva Conventions. See Y. Dinstein, "Legitimate military objectives under the current *jus in bello*" *International Law Studies*, vol. 78 (2002), p. 139, and L.R. Blank, "Extending positive identification from persons to places: terrorism, armed conflict, and the identification of military objectives" *Utah Law Review*, No. 5 (2013), p. 1227. See e.g. United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), para. 5.4; Canadian National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (2001) B-GJ-005-104/FP-021, pp. 405-427; United States Department of Defense, *Law of War Manual* (2015).

of reprisals are prohibited".[1393] This made the inclusion of draft principle 12 [II-4] essential. In their view, if the natural environment, or part thereof, became an object of reprisals, it would be tantamount to an attack against the civilian population, civilians or civilian objects, and would thus violate the laws of armed conflict.

(4) In this context, some members took the view that the prohibition of reprisals forms part of customary international law. However, other members questioned the existence of this rule, and were of the view that the rule exists only as a treaty obligation under the Additional Protocol I.[1394]

(5) Concerns were raised that including draft principle 12 [II-4] as a copy of article 55, paragraph 2, of Additional Protocol I risked the draft principles going against their main aim, which is to apply generally. Although Additional Protocol I is widely ratified and thus the prohibition of reprisals against the environment is recognized by many States, Additional Protocol I is not universally ratified.[1395] Some members were concerned that reproducing article 55, paragraph 2, verbatim in draft principle 12 [II-4] could therefore be misinterpreted as trying to create a binding rule on non-State parties. It was also pointed out in this regard that paragraph 2 of article 55 has been subject to reservations and declarations by some States parties.[1396]

[1393] Protocol I, art. 51, in particular para. 6. See C. Pilloud and J. Pictet, "Article 51" in *ICRC Commentary on the Additional Protocols* ... Sandoz and others (eds.) (footnote 1335 above), p. 615.

[1394] For a discussion on the customary law status of reprisals, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), pp. 523-530; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff, 2009), pp. 285-289; M. A. Newton, "Reconsidering reprisals" *Duke Journal of Comparative and International Law*, vol. 20 (2010), p. 361; S. Darcy, *Collective Responsibility and Accountability under International Law* (Leiden, Brill, 2007) pp. 154-156.

[1395] There are currently 174 State parties to Protocol I. See the ICRC website (www.icrc.org/ihl/INTRO/470).

[1396] For a description of declarations, statements and reservations made by States in connection with regard to, *inter alia*, art. 55, see A/CN.4/685, paras. 129 and 130. It should also be noted that the United Kingdom declared that: "The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result." The text of the reservation is available on the ICRC website www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument, at para. (m). The conditions under which belligerent reprisals against the natural environment may be taken are partly described in United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* ... (footnote 1392 above), paras. 16.18-16.19.1. For declarations that relate to the understanding of whether Protocol I is applicable only to conventional weapons and not to nuclear weapons, see A/CN.4/685, para. 130. See declarations and reservations of Ireland: "Article 55: In ensuring that care shall be taken in warfare to protect the natural environment against widespread,

(6) It is therefore worth summarizing the position of article 55, paragraph 2 (as a treaty provision), as follows: the prohibition of attacks against the natural environment by way of reprisals is a binding rule for the 174 State parties to Additional Protocol I. The extent to which States have made declarations or reservations that are relevant to its application must be evaluated on a case by case basis, since only a few States have made an explicit reference to paragraph 2 of article 55.[1397]

(7) Another contentious issue raised which merits discussion is the fact that there is no corresponding rule to article 55, paragraph 2, in common article 3 to the four Geneva Conventions or in Additional Protocol II which explicitly prohibits reprisals in non-international armed conflicts (including against civilians, the civilian population, or civilian objects). The drafting history of Additional Protocol II reveals that at the time of drafting, some States were of the view that reprisals of any kind are prohibited under all circumstances in non-international armed conflicts.[1398] There are, however, also valid arguments that reprisals may be permitted in non-international armed conflicts in certain situations.[1399]

(8) In light of this uncertainty, some members expressed concern that by not differentiating between the position in international armed conflicts and non-international armed conflicts, draft principle 12 would attempt to create a new international law rule. It was therefore suggested that the principle be redrafted with appropriate caveats, or excluded from the draft principles altogether.

(9) Concerning reprisals against the natural environment in particular, it is worth mentioning that the International Criminal Tribunal for the former Yugoslavia considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule "in armed conflicts of any kind".[1400] As the environment should be

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long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population." The declaration is available on the ICRC website at www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?documentId=27BBCD34A4918BFBC1256402003FB43A&action=OpenDocument. It should also be noted that in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (*I.C.J Reports 1996*, p. 226, at para. 46), the Court stated that: "Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality."

[1397] France, Ireland and the United Kingdom.

[1398] See the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977) vol. IX, available from www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html, most notably the statements made by Canada (p. 428), the Islamic Republic of Iran (p. 429), Iraq (p. 314), Mexico (p. 318) and Greece (p. 429). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (footnote 1331 above), p. 528.

[1399] See V. Bílková, "Belligerent reprisals in non-international armed conflicts" *International and Comparative Law Quarterly*, vol. 63 (2014), p. 31; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford, Oxford University Press, 2012), pp. 449-457.

[1400] *Prosecutor v. Duško Tadić*, case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, International Criminal Tribunal for the Former considered as a civilian object unless parts of it becomes a military objective, some members expressed the view that reprisals against the natural environment in non-international armed conflicts are prohibited.

(10) Given the controversy surrounding the formulation of this draft principle, various suggestions were made regarding ways in which the principle could be rephrased to address the issues in contention. However, it was ultimately considered that any formulation other than the one adopted was simply too precarious, as it could be interpreted as weakening the existing rule under the law of armed conflict. This would be an undesirable result, given that the existing rule is fundamental to the law of armed conflict. Despite the concerns raised during drafting, including a draft principle on the prohibition of reprisals against the natural environment was viewed as being particularly relevant and necessary, given that the overall aim of the draft principles is to enhance environmental protection in relation to armed conflict. In light of the comments made above, the inclusion of this draft principle can be seen as promoting the progressive development of international law, which is one of the mandates of the Commission.

Draft principle 13 [II-5]
Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

Commentary

(1) This draft principle corresponds with draft principle 5 [I-(x)]. It provides that an area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective. Unlike the earlier draft principle, it only covers areas that are designated by agreement. There has to be an express agreement on the designation. Such an agreement may have been concluded in peacetime or during armed conflict. The reference to the term "agreement" should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors. Such zones are protected from attack during armed conflict. The reference to the word "contain" in the phrase "as long as it does not contain a military objective" is intended to denote that it may be the entire zone, or only parts thereof. Moreover, the protection afforded to a zone ceases if one of the parties commits a material breach of the agreement establishing the zone.

(2) As mentioned above, a designated area established in accordance with draft principle 5 [I-(x)] may lose its protection if a party to an armed conflict has military objectives within the area, or uses the area to carry out any military activities during an armed conflict. The term "military objective" in the present draft principle frames the description of military objectives as "so long as it does not contain a military objective", which is different from draft principle 9 [II-1], paragraph 3, which stipulates "unless it has become a military objective". The relationship between these two principles is that principle 13 [II-5] seeks to enhance the protection established in draft principle 9 [II-1], paragraph 3.

(3) The conditional protection is an attempt to strike a balance between military, humanitarian, and environmental concerns. This balance mirrors the mechanism for

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Yugoslavia, paras. 111 and 112. See also in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* ... (footnote 1331 above), pp. 526-529.

demilitarized zones as established in article 60 of Additional Protocol I to the Geneva Conventions. Article 60 states that if a party to an armed conflict uses a protected area for specified military purposes, the protected status shall be revoked.

(4) Under the 1954 Hague Convention referred to above, State parties are similarly under the obligation to not destroy property that has been identified as cultural property in accordance with article 4 of the Convention. However, the protection can only be granted as long as the cultural property is not used for military purposes.

(5) The legal implications of designating an area as a protected area will depend on the origin and contents, as well as the form, of the proposed protected area. For example, the *pacta tertiis* rule will limit the application of a formal treaty to the parties. As a minimum, the designation of an area as a protected zone could serve to alert parties to an armed conflict that they should take this into account when applying the principle of proportionality or the principle of precautions in attack. In addition, preventive and remedial measures may need to be tailored so as to take the special status of the area into account.

Chapter XI
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

190. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[1401] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.[1402]

191. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[1403] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[1404]

192. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[1405] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014) and her fourth report during the sixty-seventh session (2015).[1406] On the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and the commentaries thereto. Draft article 2 on the use of terms is still being developed.[1407]

[1401] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[1402] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[1403] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[1404] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[1405] *Ibid., Sixty-seventh session, Supplement No. 10* (A/67/10), para. 266.

[1406] A/CN.4/654 (preliminary report); A/CN.4/661 (second report); A/CN.4/673 and Corr.1 (third report); and A/CN.4/687 (fourth report).

[1407] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48-49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48-49). At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto. At its 3284th meeting, on 4 August 2015, the Chairperson of the Drafting Committee presented the report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft articles 2 (f) and 6 provisionally adopted by the Drafting Committee at the sixty-seventh session, of which the Commission took note (*ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 176).

B. Consideration of the topic at the present session

193. The Commission had before it the fifth report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701). The Commission considered the report at its 3328th to 3331st meetings, from 26 to 29 July 2016. At the time of its consideration, the report was available to the Commission only in two of the six official languages of the United Nations. Accordingly, the debate in the Commission was preliminary in nature, involving members wishing to speak on the topic, and would be continued at its sixty-ninth session. In these circumstances, it was understood that the consideration of the report at the present session was exceptional and was not intended to set a precedent. The Commission underlined that the debate at the current session was only the beginning of the debate and that the Commission would provide to the General Assembly a complete basis of its work on this report only after the debate is finalized at the sixty-ninth session.

194. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session (see section C.1, below).

195. At its 3345th to 3346th meetings, on 11 August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the present session (see section C.2, below).

1. Introduction by the Special Rapporteur of the fifth report

196. The fifth report analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions relating to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. It drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 concerning "Crimes in respect of which immunity does not apply".[1408] The report also noted that the sixth report of the Special Rapporteur in 2017

[1408] The text of draft article 7, as proposed by the Special Rapporteur in the fifth report, reads as follows:

Draft article 7

Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(a) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(b) Crimes of corruption;

(c) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

would address the procedural aspects of immunity of State officials from foreign criminal jurisdiction.

197. In her introduction of the report, the Special Rapporteur recalled that the topic had been the subject of recurrent debate over the years in the Commission and in the Sixth Committee of the General Assembly, eliciting diverse, and often opposing views. The fifth report deals with limitations and exceptions to immunities after the Commission completed the consideration of all the normative elements of immunity *ratione personae* and immunity *ratione materiae*.

198. The Special Rapporteur stated that, in preparing the report, she had employed the same methodological approaches of previous reports, consisting of an analysis of judicial (domestic and international) and treaty practice, taking into account the prior work of the Commission, noting that the fifth report additionally contained an analysis of national legislation, as well as information received from Governments in response to questions posed by the Commission. The Special Rapporteur underlined that the fifth report, like the previous reports, had to be read and understood together with the prior reports on the topic, as these reports, constituted, a unitary whole.

199. Addressing the main substantive and methodological issues reflected in the fifth report, the Special Rapporteur stated that its aim was: (a) to analyse whether there existed situations in which the immunity of State officials from foreign criminal jurisdiction was without effect, even where such immunity was potentially applicable because all normative elements as addressed in draft articles provisionally adopted were present; and (b) to identify, if the answer to (a) were in the affirmative, the actual instances in which such immunity would be without effect, addressing in particular: (i) the limitations and exceptions to immunity; and (ii) the crimes in respect of which immunity did not apply.

200. The Special Rapporteur noted that the phrase "limitations and exceptions" reflected, in her view, a theoretical distinction that suggested that a "limitation" was intrinsic to the immunity regime itself, while an "exception" was extrinsic to it. The distinction had normative implications, as it had consequences for the systemic interpretation of immunity, suggested in the report. The Special Rapporteur nevertheless stressed that the distinction between limitations and exceptions had no practical significance as each led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in the particular case. Accordingly, for the purposes of the present draft articles, "immunity shall not apply" had been used to cover both limitations and exceptions.

201. Moreover, the report did not consider waiver of immunity to be a "limitation or an exception". Waiver of immunity produced the same effect as a limitation or an exception. However, this was not due to the existence of autonomous general rules, but rather to the exercise of the prerogative of the State of the official. Since waiver is procedural in nature, it will be examined in the sixth report, which will be devoted to the procedural aspects of immunity.

202. The report had also taken a broader perspective than merely considering international crimes. It also offered an analysis of certain other crimes, such as corruption, which is of great importance for the international community. Moreover, there were

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3. Paragraphs 1 and 2 are without prejudice to:

(a) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

(b) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

instances of State practice on non-application of immunity in circumstances based on the primacy of territorial sovereignty in the exercise of criminal jurisdiction by the forum State (akin to the "territorial tort exception" in relation to the jurisdictional immunity of the State).

203. The Special Rapporteur also underlined a number of considerations which had to be taken into account in the appreciation of the regime for the application of limitations and exceptions to immunity:

(a) Immunity and jurisdiction were inextricably linked. She described the former as an exception to the exercise of jurisdiction by the courts of the forum State. Although both were based on the sovereign equality of States, the exceptional character of immunity had to be taken into account when defining the possible existence of limitations and exceptions;

(b) The procedural nature of immunity meant that it did not absolve a State official from individual criminal responsibility. Accordingly, in a formal sense, immunity could not be equated to impunity. However, it was underscored that, under certain circumstances, immunity could result, in effect, in the impossibility of determining the individual criminal responsibility of a State official. It was such effect that had to be borne in mind when analysing limitations and exceptions to immunity;

(c) The immunity of State officials from foreign criminal jurisdiction had a bearing on criminal proceedings intended to determine, as appropriate, the individual criminal responsibility of the author of certain crimes. Such immunity was different and distinguishable from State immunity, and was subject to a distinct legal regime, including with regard to limitations and exceptions to immunity;

(d) The horizontal application of immunity between States, the subject of the present topic, was distinct and separate from the vertical application of immunity before international criminal courts and tribunals. At the same time, however, the mere existence of international criminal courts and tribunals could not always be considered as an alternative mechanism for determining the criminal responsibility of State officials. Therefore, the existence of international criminal tribunals cannot be considered as a foundation for the absence of exceptions.

204. In the treatment of relevant practice covered by the report, the Special Rapporteur underlined the relevance of such practice in identifying the limitations and exceptions to immunity. This was supplemented by a systemic approach to the interpretation of immunity and the limitations and exceptions thereto. Accordingly, although the practice was varied, it revealed a clear trend towards considering the commission of international crimes as a bar to the application of the immunity *ratione materiae* of State officials from foreign criminal jurisdiction. This was on the basis that: (a) such crimes were not considered official acts, or were an exception to immunity, owing to the serious nature of the crime; or (b) they undermined the values and principles recognized by the international community as a whole.

205. On the first point, it was noted that, even though national courts had sometimes recognized immunity from foreign criminal jurisdiction for international crimes, they had always done so in the context of immunity *ratione personae*, and only in exceptional circumstances was it in respect of immunity *ratione materiae*. Such practice, coupled with *opinio juris*, led to the conclusion that contemporary international law permitted limitations or exceptions to immunity *ratione materiae* from foreign criminal jurisdiction when international crimes were committed. Further, although there might be doubt as to the existence of a relevant general practice amounting to a custom, there was a clear trend that reflected an emerging custom.

206. On the question concerning "values and legal principles", the report had sought to address limitations and exceptions to immunity on the basis of a view of international law as a normative system of which the legal regime of immunity of State officials from foreign criminal jurisdiction formed part. In order to avert the negative effects occasioned by the application of an immunity regime, or the nullification of other components of the contemporary system of international law, it was underlined that such a systemic approach was necessary. This approach also informed the way in which the report addressed the relationship of immunity to other essential categories of contemporary international law, such as prohibitions against peremptory norms of international law (*jus cogens*), as well as to the attribution of a legal character to concepts of impunity and accountability, and to the fight against impunity, the right of access to justice, the right of victims to reparation, or the obligation of States to prosecute certain international crimes in a similar vein.

207. In the view of the Special Rapporteur such an approach, which better responded to concerns expressed by some States and members of the Commission in the debates over the years, was consistent with contemporary international law. It did not alter the basic foundations of international criminal law that had been gradually built since the last century, especially the principle of individual criminal responsibility for international crimes and the need to guarantee the existence of effective mechanisms for the fight against impunity for such crimes. At the same time, it took into account other important elements of international law, in particular the principle of sovereign equality of States.

208. The Special Rapporteur also introduced the various elements of the proposed draft article 7. She drew the attention to the three categories of crimes concerning which immunity did not apply, the fact that limitations and exceptions applied only in respect of immunity *ratione materiae*, and on the existence of two particular regimes considered *lex specialis*.

2. Summary of the debate

(a) General comments

209. The debate at the present session was only the beginning of the discussion of this aspect of the topic. It will be continued at the sixty-ninth session of the Commission. The summary below should be understood bearing these considerations in mind. A summary of the full debate, including the summing up by the Special Rapporteur, will be available after the debate is concluded in 2017.

210. Those members who spoke generally welcomed the Special Rapporteur's fifth report for its rich systematic and well-documented examples of State practice as reflected in treaties and domestic legislation, as well as in international and national case law. It was readily recognized that the subject matter, in particular the question of limitations and exceptions, was legally complex and raised issues that were politically highly sensitive and important for States. It was also recalled that disagreements within the Commission, and in the views among States, exist, with some members pointing out that the topic needed to be proceeded with prudently and cautiously. It was said by some members said that the Commission should focus on codification rather than progressive development of new norms of international law in dealing with the issue of limitations and exceptions. Others members stated that this issue should be dealt with taking account both the codification and the progressive development of international law.

(b) Comments on methodological and conceptual issues raised in the fifth report

211. In their comments, the members who spoke addressed the various aspects of the report. They referred to those concerning the prior consideration by the Commission of the question of limitations and exceptions, offered comments on the treatment of relevant

practice, addressed some methodological and conceptual questions relating to limitations and exceptions, tackled questions concerning the legal nature of the immunity regime, and examined instances in which the immunity of State officials from foreign criminal jurisdiction did not apply, in the context of the draft article 7, as proposed by the Special Rapporteur. While some members expressed support for the approaches taken, some other members were opposed to them.

Prior consideration by the Commission of the limitation and exceptions

212. Some members expressed their appreciation for the lucid and balanced approach taken by the Special Rapporteur in her treatment of limitations and exceptions, for which they expressed their gratitude. This was achieved through a review of the practice and relevant case law and careful balance between an adherence to the immunity of State officials under customary international law and a prudent examination of the possibilities for progressive development, consistent with the approach chosen by the Special Rapporteur from the beginning of her work.

213. Some other members recalled with appreciation the study by the Secretariat, as well as previous work conducted by the former Special Rapporteur. It was suggested that the point of departure for consideration of the limitations and exceptions should have been the conclusions by the previous Special Rapporteur, from which it should have been demonstrated whether or not the conclusions reached in 2008 could still be justified and maintained in light of the subsequent developments in international law. These members also indicated that the Special Rapporteur had made a gradual deviation from her own approaches in the treatment of the topic, shifting the focus from codification to progressive development, resulting in a loss of balance.

Study of practice

214. Some members were critical of the report for not faithfully following the analytical process of identification of customary international law referred to therein. Moreover, the conclusions that were sometimes reached were often irreconcilable with certain other assertions made in the report. In particular, concerns were expressed regarding the treatment of the case law, which was of varied origin, the choice of which appeared selective, the reliance in some cases on separate and dissenting opinions, as well as reliance on limited sample of national legislation, some of which it was suggested was of limited relevance in the consideration of the topic. It was further noted that a trend towards an exception in domestic courts, even if it existed, was not a general practice for purposes of constituting a rule of customary international law.

215. Accordingly, these members considered that it was not clear whether such approach in the analyses sufficiently supported the conclusions drawn in the report, and in some instances, the case law relating to the exercise of international criminal jurisdiction was unhelpful in determining whether customary international law recognized the existence of an exception to immunity *ratione materiae* before a foreign criminal jurisdiction. The consequence of the Special Rapporteur's approach was the expansion of the limitations and exceptions to immunity to cover crimes under international law to include even ordinary crimes.

216. It was further stated in the same context that, instead of grounding the report on "values and legal principles" of the international community, the focus should have been on following strictly the process of identification of customary international law, supported by normative sources. The proposals made should have been clarified as being by way of progressive development of international law.

217. On the other hand, the members of the Commission that took part in the debate generally considered that the report contained an extensive and deep analysis of practice. Moreover, some members considered that the analysis of practice shows the existence of a clear trend towards admitting certain limitations and exceptions to immunity, and provided sufficient basis for the proposals made by the Special Rapporteur.

218. Furthermore, in the view of some members, even though there was bound to be a divergence of views on the legal regime of immunity of State officials from foreign criminal jurisdiction and its nature, the report would have a significant impact on the understanding and treatment of such immunity and would assist States and other relevant actors in the elaboration of an immunity regime that took into account the various legal interests. Accordingly, they expressed support for the approach pursued by the Special Rapporteur and noted that the analysis and conclusions on the doctrine were intrinsically linked to practice and judicial pronouncements, which would give a concrete underpinning for the proposals on limitations and exceptions. The reader of the report would have a comprehensive and full understanding of the background to the issues involved, the various positions on the matter, the nuances of immunity at the international and the national levels, and the policy considerations involved. These members concurred in the conclusion that the practice analysed in the report showed a trend towards the recognition that immunity does not apply when international crimes have been committed.

219. Moreover, it was considered by these members that providing indisputable proof of the existence of a norm of international customary law was not necessarily the exclusive way for addressing the issue of limitations and exceptions. Accordingly, the reference to "values and legal principles" was considered quite useful.

220. The point was also made that a commendable effort had been made by the Special Rapporteur to bridge differences in the Commission on the question of limitations and exceptions to immunity, while presenting a thoughtful, albeit challenging, approach to addressing the matter for the Commission to consider. By identifying a trend, the Special Rapporteur had offered a middle ground between those who sought concordance of the immunity regime at the vertical and horizontal levels, and those who considered that the Commission should not identify any limitation and exception because customary international law did not provide for such exceptions.

Legal nature of immunity

Relationship between immunity and jurisdiction

221. Some members pointed out, recalling the decision of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case, that immunity and jurisdiction, even though related, were different regimes. The fact that international instruments seeking to prevent and punish certain serious international crimes required States parties to establish jurisdiction, to investigate, arrest, prosecute or extradite and provided for other forms of cooperation, did not affect the immunity of State officials from foreign criminal jurisdiction under customary international law. Such immunities, as noted in the *Arrest Warrant* case, remained opposable before the courts of a foreign State, even where such courts exercised jurisdiction under the instruments in question.

222. On the other hand, it was observed that the quest for accountability was not and should not be regarded as a mechanism to disturb peace, interfere in the internal affairs of States or constitute a transgression on the sovereignty of States or the will of their peoples. On the contrary, the lack of justice and prevalence of impunity contributed to tensions in international relations and undermined the core legal principles for inter-State relations. Accordingly, it was asserted that there was a need for a balance of the various legitimate interests involved, taking into account the right of the State to protect its sovereignty,

including of its people and the sovereign equality of States within the confines of international law.

223. It was equally underlined that the effect of the Rome Statute on the draft articles being elaborated should not be underestimated. In particular, it was observed in relation to article 27 of the Statute that immunity and individual criminal responsibility were intrinsically linked, and that viewing immunity as a mere procedural bar, in absolute terms, divorced it from the question of individual responsibility, without affording effective redress.

Relationship between immunity and responsibility

224. Some members recalled that case law, including that of the International Court of Justice in the *Arrest Warrant* and the *Jurisdictional Immunities of the State* cases showed that immunity did not absolve a State official of any individual criminal responsibility on the substance nor was it intended to foster impunity, given that the *Arrest Warrant* case offered possible measures to avoid impunity, consisting of domestic prosecution, waiver of immunity, prosecution after termination of term of office, and prosecution before an international criminal justice system. Accordingly, it was inaccurate to equate impunity with immunity, as the former involved substantive considerations, addressing issues of individual criminal responsibility, while the latter was concerned with procedural issues.

225. At the same time, some other members endorsed the approach taken by the Special Rapporteur in the fifth report. It was noted that immunity *ratione personae* was distinct from immunity *ratione materiae*, which necessitated the need to take a more nuanced view in order to make progress on the subject. While a State establishing criminal jurisdiction over persons enjoying status-based immunity *ratione personae* would impair the ability of the State of which those persons are the agents in its functioning and exercise of its sovereignty, such was not always the case with immunity *ratione materiae*, given its conduct-based nature. The fact that, immunity *ratione materiae* as reflected in draft article 6, provisionally adopted at the present session, was enjoyed only with respect to acts performed in an official capacity, meant that there was no automaticity to its application as a procedural bar.

Relationship between State immunity and immunity of a State official

226. Some members stated that the immunity of State officials from foreign criminal jurisdiction was rooted in State immunity, which reflected the principle par *in parem non habet imperium*. Any suggestion that norms of *jus cogens* or rules on combating serious international crimes conflicted with basic rights of States, was tantamount to subordinating the principle of sovereign equality of States, a cornerstone of inter-State relations, to other rules, and risked gradually eroding it. Moreover, any exceptions to immunity were likely to undermine the principle of non-intervention in internal affairs, with potential risks for politically motivated prosecutions of a Head of State or other high-ranking State officials by States, and would lead to abuse of universal jurisdiction. Instead of contributing to combating crimes and providing the protection of human rights, such developments, it was suggested would undermine the stability of inter-State relations and defeat the course of international justice.

227. On the other hand, some members observed that developments in the last century in civil jurisdictional matters had witnessed a departure from the concept of absolute immunity of the State. Moreover, Sovereign (State) immunity was not the same as the immunity of State officials from foreign criminal jurisdiction. Additionally, although a State was responsible for internationally wrongful acts, including for acts committed by its officials, a State as such could not commit a crime under the law of State responsibility. Its responsibility was not criminal, whereas its officials, based also on developments in the last

century, were capable of being held criminally responsible. These distinctions should be borne in mind when addressing the immunity of State officials, its possible limitations and exceptions and the overall scheme of balancing legitimate legal interests.

Relationship between national and international jurisdiction

228. The point was made that an appreciation of the issues canvassed in the fifth report under contemporary principles of international law required a balancing of interests, starting with the scheme under the Charter of the United Nations, which reflected certain aspirations for humanity, including protection of human rights, the pursuit of justice and respect for obligations consistent with international law, based on certain fundamental principles, not least the sovereign equality of States.

229. On this understanding, it was argued that protecting human rights and fundamental freedoms was not peripheral to sovereign equality; nor was justice incompatible with the respect of obligations arising from international law. The report as presented, as read together with previous reports, had strived to demonstrate that the operation of the principles were not intended to be mutually exclusive, as they complemented each other and ought to be applied in a manner that ensured that one interest did not adversely impact another.

230. Moreover, even though the immunity of officials from international criminal jurisdiction was not at issue in relation to this topic, there were legal policy considerations that required to be taken into account, as part of the balancing of interests, including the interest, on the one hand, of the international community as a whole in protecting itself from the commission of international crimes, as well as from violations of *jus cogens* norms and, on the other, of preserving the integrity of the cooperation obligations between national and international courts.

231. A reference was also made supporting the existence of a close relationship between the exercise of immunity before *national* courts and before *international* courts necessitating a systemic interpretation of the systems. In this context a reference was made to the system of complementarity under the Rome Statute, which should not be impeded by the rules of immunity.

232. On the other hand, it was recalled that the relationship between a State and an international criminal jurisdiction, such as that of the International Criminal Court, was different from the horizontal inter-State relationship implicated in the present topic. While article 27 of the Rome Statute had established the irrelevance of official capacity under which State party officials did not enjoy procedural immunity before the International Criminal Court, this provision could not be cited as evidence of the existence of an exception in a horizontal inter-State relationship, which was preserved under article 98 of the same Statute.

233. Moreover, it was recalled by some members that a treaty did not create obligations or rights for a third State without its consent. Accordingly, the inapplicability of immunity agreed upon among States through treaties only applied to States parties or the cases provided by the Convention, and such exceptions if they arose in a vertical relationship with an international criminal jurisdiction would not be appropriate to be cited as evidence of a customary rule in a horizontal relationship among States.

234. It was nevertheless observed that instead of disregarding the practice of international criminal tribunals as having no impact on horizontal relations, developments needed to be considered carefully, in the context of each case. For example, in some instances the question submitted to the domestic court was not the question of immunity under international law but that of immunity under the domestic law.

(c) Comments on draft article 7

235. Several members supported the proposal to identify crimes in respect of which immunity *ratione materiae* did not apply. In this context, some members supported the methodological approaches pursued by the Special Rapporteur in viewing immunity on the basis of a view of international law as a complete normative system, in order to ensure that the regime of immunity did not produce negative effects on, or nullify, other components of the contemporary system of international law as a whole. Further, some members agreed with the analysis of the Special Rapporteur that the attribution of *ultra vires* acts of State officials to a State for the purpose of State responsibility was different from the issue of *ultra vires* acts which do not entitle the official concerned to immunity *ratione materiae*.

236. Moreover, the view was expressed that the finding by the International Court of Justice in the *Arrest Warrant* case that no customary law exception for the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they were suspected of having committed war crimes or crimes against humanity, ought to be construed narrowly, as the determination was specific to immunity *ratione personae*.

237. The observation was also made that existing State practice showed that immunity *ratione materiae* was irrelevant when a forum State exercised its legitimate territorial criminal jurisdiction. When a crime was committed in a forum State, it affected such a State which, therefore, had a legitimate interest to prosecute. Further, practice indicated that there was no customary rule granting immunity to State's officials for *all* acts performed in an official capacity.

238. Some other members disagreed with the Special Rapporteur's conclusion that an exception to immunity *ratione materiae* existed in respect of certain crimes, recalling, that the former Special Rapporteur, had concluded that there was no exception to immunity other than the situation where criminal jurisdiction was exercised by a State in whose territory an alleged crime had taken place and certain conditions were met. These members reiterated that immunity was procedural in nature, and was not intended to resolve the substantive question of the lawfulness or unlawfulness of particular conduct, even if a particular act was a prohibition of a *jus cogens* norm. It was recalled that the International Court of Justice in the *Jurisdictional immunities of the State* case had noted that State immunity and norms of *jus cogens* were different categories of international law. Consequently, a violation of a *jus cogens* norm did not entail the absence of a plea of State immunity. Moreover, it was noted any differentiation based on the severity of the offence was not tenable, as immunity would apply equally to serious and to ordinary crimes. Given that immunity from foreign criminal jurisdiction was preliminary in nature and decided in *limine litis*, it would be odd to consider that its invocation would depend on a determination of whether a crime was serious or had actually been committed.

239. As regards **paragraph 1**, some members commended the Special Rapporteur for taking the courageous step of presenting a proposed draft article on limitations and exceptions, which was a balanced and unambiguous proposal, while some other members found it unconvincing.

240. Concerning **paragraph 1, subparagraph (a)**, some members expressed their support for the specific reference to genocide, crimes against humanity, war crimes, torture and enforced disappearances, as international crimes to which immunity did not apply. The specific references to "torture" and "enforced disappearance", even though they formed part of crimes against humanity, were considered useful. There was also support expressed for the inclusion of the crime of apartheid, which was mentioned in the report among the other crimes included in the present proposal.

241. The reasons advanced by the Special Rapporteur for the exclusion of the crime of aggression from the list were found unconvincing by some members who considered that it would be remiss were the Commission to exclude it as an exception to immunity in terms of draft article 7. These members would have preferred to include this crime, given that States were already enacting domestic implementing legislation upon ratification of the Kampala Amendments criminalizing it. Moreover, the crime of aggression, considered the most serious and dangerous form of the illegal use of force, was committed by State officials as an act performed in an official capacity.

242. Some other members, however, supported the non-inclusion of the crime of aggression since it was closely related to and dependent on the acts of the aggressor State, with implications for sovereignty and immunity of States. It was also noted that the Kampala amendments modifying the Rome Statute, on definition of the crime of aggression, had not yet entered into force.

243. Regarding "crimes of corruption" referred to in **paragraph 1, subparagraph (b)**, while some members supported their inclusion, other members expressed reservation as to their inclusion since this category of crimes was of a character different from serious international crimes. It was considered important in deciding whether acts of corruption constituted exceptions to immunity, to determine primarily whether the acts of corruption were "acts performed in an official capacity", and it was doubted that such acts as such fell within the scope of immunity *ratione materiae*. It also was noted that there was no practice indicating the inapplicability of immunity *ratione materiae* in respect of acts of corruption.

244. Some reservations were expressed regarding crimes referred to in **subparagraph (c)**, and some members considered the term "territorial tort exception" not to be entirely felicitous for situations involving criminal jurisdiction. Although it was relevant in respect of the jurisdictional immunities of the State, there was limited State practice to warrant its inclusion with respect to the immunity of State officials from foreign criminal jurisdiction. The point was also made that the subparagraph was couched in absolute terms, which risked encompassing all kinds of activities carried out by State officials in the forum State, including conceivably acts of military forces of the State. Nevertheless, some members expressed the view that it was interesting to consider this proposal. Other members only accepted the more limited exception identified by the former Special Rapporteur in his second report.

245. Several members expressed support for the formulation of **paragraph 2**, viewing it as setting out an uncontroversial proposition and reflecting State practice. However, some reservation was expressed as it was perceived to be an "exception to limitations and exceptions" in paragraph 2, and its deletion was sought. It was suggested that any formulation should be in line with article 27 of the Rome Statute, and that a clear link should be established between draft article 7 and draft articles 4 and 6 already provisionally adopted. An additional suggestion was made to revisit the limitation in draft article 4 on scope of immunity *ratione personae* provisionally adopted by the Commission.

246. Some members considered the "without prejudice" clause reflecting a duty to cooperate arising from other regimes in **paragraph 3** acceptable.

(d) Future work

247. As regards future work, the link between limitations and exceptions and the procedural aspects of immunity was emphasized. In this connection, several members underlined the importance, for next year, of procedural guarantees to take into account the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction.

248. The debate on the fifth report will be continued and completed at the next session of the Commission in 2017.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

249. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Article 2
Definitions

For the purposes of the present draft articles:

...

(e) "State official" means any individual who represents the State or who exercises State functions;

(f) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority;

Part Two
Immunity *ratione personae*

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Part Three
Immunity *ratione materiae*

Article 5
Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

250. The text of the draft articles, and commentaries thereto, provisionally adopted by the Commission at its sixty-eighth session, is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

Article 2
Definitions

For the purposes of the present draft articles:

[…]

(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Commentary

(1) Draft article 2 (f) defines the concept of an "act performed in an official capacity" for the purposes of the present draft articles. Despite the doubts expressed by some members as to whether this provision was necessary, the Commission thought it would be useful to include the definition in the draft articles given the centrality of the concept of an "act performed in an official capacity" in the regime of immunity *ratione materiae*.

(2) The Commission has included in the definition contained in draft article 2 (f) the elements that make it possible to identify a particular act as being an "act performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. In so doing, it has essentially followed the Commission's previous work on the topic. For example, the term "act" is used in the definition as it was in draft articles 4 and 6. As noted at the time, the term was previously used by the Commission to refer to both

actions and omissions, and it is also the term generally used to refer to the conduct of individuals in the context of international criminal law.[1409]

(3) The Commission has used the expression "in the exercise of State authority" to reflect the need for a link between the act and the State. In other words, the aim is to highlight that it is not sufficient for a State official to perform an act in order for it automatically to be considered an "act performed in an official capacity". On the contrary, there must also be a direct connection between the act and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of sovereign equality of States.

(4) In this regard, the Commission believes that, in order for an act to be characterized as an "act performed in an official capacity", it must first be attributable to the State. However, this does not necessarily mean that only the State can be held responsible for the act. The attribution of the act to the State is a prerequisite for an act to be characterized as having been performed in an official capacity, but does not prevent the act from also being attributed to the individual, in accordance with the "single act, dual responsibility" model (double attribution) that the Commission already applied in its 1996 draft Code of Crimes against the Peace and Security of Mankind (article 4),[1410] the articles on responsibility of States for internationally wrongful acts (article 58)[1411] and the articles on the responsibility of international organizations (article 66).[1412] Under the model, a single act can engage both the responsibility of the State and the individual responsibility of the author, especially in criminal matters.

(5) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless, it must be borne in mind that the Commission established those rules in the context and for the purposes of State responsibility. Consequently, the application of the rules to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. For the purposes of immunity, the criteria for attribution set out in articles 7, 8, 9, 10 and 11 of the articles on responsibility of States for internationally wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, acts performed by an official purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified.[1413] It does not mean, however, that an

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[1409] See paragraph (5) of the commentary to draft article 4, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), pp. 68-69.

[1410] *Yearbook ... 1996*, vol. II (Part Two), p. 23.

[1411] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142. The articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001.

[1412] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), p. 171. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

[1413] The following arguments by a court in the United States, in particular, clarify the reasons for the exclusion of *ultra vires* acts: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do." According to that court, the "FSIA [Foreign Sovereign Immunity Act] does not immunize the illegal conduct of government officials" and thus, "an official acting under color of authority, but not within an official mandate, can violate unlawful act as such cannot benefit from immunity *ratione materiae*. Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,[1414] even in cases when the act is contrary to international law.[1415] The question whether or not acts *ultra vires* can be considered as official acts for the purpose of immunity from foreign criminal jurisdiction will be addressed at a later stage, together with the limitations and exceptions to immunity.

(6) In order for an act to be characterized as having been "performed in an official capacity", there must be a special connection between the act and the State. Such a link has been defined in draft article 2 (f) using the formulation "State authority", which the Commission considered sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State, and is to be understood as covering the functions set out in draft article 2 (e), which refers to any individual who "represents the State or who exercises State functions".[1416]

(7) This formulation was considered preferable to the one initially proposed ("exercising elements of the governmental authority") and to others that were successively considered by the Commission, in particular "governmental authority" and "sovereign authority". Although they all equally reflect the requirement that there must be a special connection between the act and the State, there is the difficulty that they may be interpreted as referring exclusively to a type of State activity (governmental or executive), or give rise to the added problem of having to define the elements of governmental authority or sovereignty, which would be extremely difficult and is not considered part of the Commission's mandate. In addition, it was considered preferable not to use the expression "State functions", which is used in draft article 2 (e), in order to make a clear distinction between the definitions contained in paragraphs (e) and (f) of the draft article. In this regard, it should be recalled that the expression "State functions", together with representation of the State, was used in draft article 2 (e) as a neutral term to define the link between the official and the State, without making any judgment as to the type of acts covered by immunity.[1417] The use of the term "authority" rather than "functions" also has the advantage of avoiding the debate on whether or not international crimes are "State

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international law and not be entitled to immunity under FSIA". (In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994, 25 F.3d 1467 (9th Cir.1994), *International Law Reports* (ILR), vol. 104, pp. 119 *et seq.*, particularly pp. 123 and 125). Similarly, another court concluded that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs: If officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity (In *Jane Doe I, et al. v. Liu QI, et al., Plaintiff A, et al. v. Xia Deren, et al.*, United States District Court, N.D. California, C 02-0672 CW, C 02-0695 CW).

[1414] *Jaffe v. Miller and Others*, Ontario Court of Appeal (Canada), judgment of 17 June 1993, ILR, vol. 95, p. 446; *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 23 January 1989, ILR, vol. 81, p. 658; *McElhinney v. Williams*, Supreme Court of Ireland, 15 December 1995, ILR, vol. 104, p. 691.

[1415] *I° Congreso del Partido*, House of Lords, United Kingdom, 16 July 1981, [1983] A.C. 244, ILR, vol. 64, p. 307. In *Jones v. Saudi Arabia*, House of Lords, 14 June 2006, [2006] UKHL 26, Lord Hoffmann rejected the argument that an act contrary to *jus cogens* cannot be an official act (see ILR, vol. 129, p. 744).

[1416] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 231.

[1417] See paragraph (11) of the commentary to draft article 2 (e), *ibid.*, p. 235. In this context, the Commission has taken the view that "State functions" include "the legislative, judicial, executive or other functions performed by the State" (*ibid.*).

functions". However, one member was of the view that it would have been more appropriate to use the expression "State functions".

(8) The Commission did not consider it appropriate to include in the definition of an "act performed in an official capacity" a reference to the fact that the act must be criminal in nature. In so doing, the aim was to avoid a possible interpretation that any act performed in an official capacity is, by definition, of a criminal nature. In any case, the concept of an "act performed in an official capacity" must be understood in the context of the present draft articles, which is devoted to the immunity of State officials from foreign criminal jurisdiction.

(9) Lastly, although the definition contained in draft article 2 (f) concerns an "act performed in an official capacity", the Commission considered it necessary to include in the definition an explicit reference to the author of the act, in other words, the State official. It thereby draws attention to the fact that only a State official can perform an act in an official capacity, thus reflecting the need for a link between the author of the act and the State. In addition, the reference to the State official creates a logical continuity with the definition of "State official" in draft article 2 (e).

(10) The Commission does not believe that it is possible to draw up an exhaustive list of acts performed in an official capacity. Such acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act in question has been performed by a State official, is generally attributable to the State and has been performed in "the exercise of State authority". However, there are examples from judicial practice of acts or categories of acts that may be considered as having been performed in an official capacity, regardless of how the courts specifically refer to them. Such examples can help judges and other national legal practitioners to identify whether a particular act falls into the category.

(11) In general, national courts have found that the following acts fall into the category of acts performed in an official capacity: military activities or those related to the armed forces,[1418] acts related to the exercise of police power,[1419] diplomatic activities and those relating to foreign affairs,[1420] legislative acts (including nationalization),[1421] acts related to the administration of justice,[1422] administrative acts of different kinds (such as the expulsion

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[1418] *Empire of Iran*, Federal Constitutional Court of Germany, 1963, ILR, vol. 45, p. 57; *Victory v. Comisaria*, US 336 F. 2d 354 (Second Circuit, 1964), ILR, vol. 35, p. 110; *Saltany and Others v. Reagan and Others*, District Court for the District of Columbia, United States, judgment of 23 December 1988, ILR, vol. 80, p. 19; *Holland v. Lampen-Wolf* (United Kingdom), [2000] 1 WLR 1573; *Lozano v. Italy*, case No. 31171/2008, Italy, Court of Cassation, judgment of 24 July 2008 (available at http://opil.ouplaw.com, *International Law in Domestic Courts* [ILDC 1085 (IT 2008)]).

[1419] *Empire of Iran* (see footnote 1418 above); *Church of Scientology*, Federal Supreme Court of Germany, judgment of 26 September 1978, ILR, vol. 65, p. 193; *Saudi Arabia and Others v. Nelson*, United States Supreme Court, ILR, vol. 100, p. 544; *Propend Finance Pty Ltd. v. Sing*, United Kingdom, Court of Appeal, 1997, ILR, vol. 111, p. 611; *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom*, High Court of Ireland, judgment of 24 April 1997, [1997] 2IR 121; *First Merchants Collection v. Republic of Argentina*, United States District Court, Southern District of Florida, 31 January 2002, 190 F. Supp. 2d 1336 (S.D. Fla. 2002).

[1420] *Empire of Iran* (see footnote 1418 above); *Victory v. Comisaria* (see footnote 1418 above).

[1421] *Empire of Iran* (see footnote 1418 above); *Victory v. Comisaria* (see footnote 1418 above).

[1422] *Empire of Iran* (see footnote 1418 above); case No. 12-81.676, Court of Cassation, Criminal Chamber (France), judgment of 19 March 2013, and case No. 13-80.158, Court of Cassation, Criminal Chamber (France), judgment of 17 June 2014 (see www.legifrance.gouv.fr). The Swiss courts made a similar ruling in the case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

of aliens or the flagging of vessels),[1423] acts related to public loans[1424] and political acts of various kinds.[1425]

(12) Moreover, the immunity of State officials has been invoked before criminal courts in relation to the following acts that were claimed to be committed in an official capacity: torture, extermination, genocide, extrajudicial executions, enforced disappearances, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[1426] Such crimes are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.[1427] Second, the courts have considered other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, illegal detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[1428]

[1423] *Victory v. Comisaria* (see footnote 1418 above); *Kline and others v. Yasuyuki Kaneko and others*, US, 685 F Supp. 386 (SDNY 1988), ILR, vol. 101, p. 497; *Malta Maritime Authority*, No. 04-84.265, Court of Cassation, Criminal Chamber (France), judgment of 23 November 2004, *Bulletin criminel 2004*, No. 292, p. 1096.

[1424] *Victory v. Comisaria* (see footnote 1418 above).

[1425] *Doe I v. Israel*, US, 400 F. Supp. 2d 86, 106 (DCC 2005) (establishment of Israeli settlements in the occupied territories); *Youming*, US, 557 F. Supp. 2d 131 (DDC 2008) (hiring of contract killers to threaten members of a religious group).

[1426] In re *Rauter*, Special Court of Cassation of the Netherlands, judgment of 12 January 1949, ILR, vol. 16, p. 526 (crimes committed by German occupation forces in Denmark); *Attorney General of Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (case No. 40/61), judgment of 12 December 1961, and Appeal Tribunal, judgment of 29 May 1962, ILR, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); *Yaser Arafat (Carnevale re. Valente — Imp. Arafat e Salah)*, Italy, Court of Cassation, judgment of 28 June 1985, *Rivista di diritto internazionale* 69 (1986), No. 4, p. 884 (sale of weapons and collaboration with the Red Brigades on acts of terrorism); *R. v. Mafart and Prieur/Rainbow Warrior (New Zealand v. France)*, New Zealand, High Court, Auckland Registry, 22 November 1985, ILR, vol. 74, p. 241 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); *Former Syrian Ambassador to the German Democratic Republic*, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, judgment of 10 June 1997, ILR, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, in diplomatic premises, weapons that were later used to commit terrorist acts); *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal of Amsterdam, 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266 to 282 (torture, crimes against humanity); *Gaddafi*, Court of Appeal of Paris, judgment of 20 October 2000, and Court of Cassation, judgment of 13 March 2001, ILR, vol. 125, pp. 490 and 508 (ordering a plane to be brought down using explosives, which caused the death of 170 people, considered as terrorism); *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar (Senegal), judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001, ILR, vol. 125, pp. 571 and 577 (acts of torture and crimes against humanity); *Re Sharon and Yaron*, Court of appeal of Brussels, judgment of 26 June 2002, ILR, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); *A. v. Office of the Public Prosecutor of the Confederation* (*Nezzar* case), Federal Criminal Court of Switzerland (case No. BB.2011.140), judgment of 25 July 2012 (torture and other crimes against humanity).

[1427] In re *Ye v. Zemin*, United States Court of Appeal, Seventh Circuit, 383F. 3d 620 (2004) (unlike the cases cited in footnotes 1426 and 1428, this was a case before a civil court).

[1428] *Border Guards Prosecution*, Federal Criminal Court of Germany, judgment of 3 November 1992 (case No. 5 StR 370/92), ILR, vol. 100, p. 364 (death of a young German, as a result of shots fired by border guards of the German Democratic Republic, when he attempted to cross the Berlin Wall); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom* (see footnote 1419

(13) In a number of cases, *a contrario sensu*, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State, and was therefore not considered an act performed in an official capacity. For example, courts have concluded that the assassination of a political opponent[1429] or acts linked to drug trafficking[1430] do not constitute official acts. Similarly, national courts have generally denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption, on the grounds that such acts "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[1431] and "by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest".[1432] Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[1433] The factual reminder of those various examples is without prejudice to the position that the Commission may take on the subject of exceptions to immunities.

(14) With regard to the examples of possible acts performed in an official capacity, special mention should be made of the way in which national courts have dealt with international crimes, especially torture. While in some cases they have been considered acts performed in an official capacity (although illegal or aberrations),[1434] in others they have

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above) (irregular circumstances during the detention of the plaintiff by State officials); *Khurts Bat v. Investigating Judge of the German Federal Court*, United Kingdom ([2011] EWHC 2029 (Admin)), ILR, vol. 147, p. 633 (kidnapping and illegal detention).

[1429] *Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile*, United States Court of Appeals, Second Circuit, 748 F 2d 790 (1984), ILR, vol. 79, p. 561.

[1430] *United States of America v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgment of 7 July 1997, ILR, vol. 121, p. 591.

[1431] *Teodoro Nguema Obiang Mangue and Others*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, judgment of 13 June 2013.

[1432] *Teodoro Nguema Obiang Mangue and Others*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, application for annulment, judgment of 16 April 2015.

[1433] *United States of America v. Noriega* (see footnote 1430 above); *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgment of 20 September 1996, ILR, vol. 113, p. 522; *Mellerio v. Isabelle de Bourbon*, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hammoud, Prince Rashid v. Wiercinski*, Tribunal civil de la Seine, judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Egypte Farouk v. s.a.r.l. Christian Dior*, Court of Appeal of Paris, judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716-718; *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418; In re *Estate of Ferdinand E. Marcos Human Rights Litigation; Trajano v. Marcos and Another*, United States Court of Appeals, Ninth Circuit, 21 October 1992, 978 F 2d 493 (1992), ILR, vol. 103, p. 521; *Doe v. Zedillo Ponce de León*; *Jimenez v. Aristeguieta et al.*, United States Court of Appeals, Fifth Circuit, 311 F 2d 547 (1962), 33 ILR 353; *Jean-Juste v. Duvalier* (1988), No. 86-0459 Civ. (U.S. District Court, S.D. Fla., 8 January 1988, *American Journal of International Law*, vol. 82, No. 3 (1988), p. 594; *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal of Switzerland, judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, *International Law in Domestic Courts* [ILDC 339 (CH 2005)]; *Republic of the Philippines v. Marcos and Others*, United States Court of Appeals, Second Circuit, 26 November 1986, ILR, vol. 81, p. 581; *Republic of the Philippines v. Marcos and Others (No. 2)*, United States Court of Appeals, Ninth Circuit, 4 June 1987 and 1 December 1988, ILR, vol. 81, p. 608; *Republic of Haiti and Others v. Duvalier and Others*, [1990] 1 QB 2002 (United Kingdom), ILR, vol. 107, p. 491.

[1434] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147. Only Lord Goff been qualified as *ultra vires* acts or acts that are not consistent with the nature of State functions,[1435] and should therefore be excluded from the category of acts defined in this paragraph. Moreover, attention should be drawn to the fact that such different treatment of international crimes has arisen both in cases in which national courts have recognized immunity and in those in which they have rejected it.

(15) In any case, it should be borne in mind that the definition of an "act performed in an official capacity" set out draft article 2 (f) refers to the distinct elements of this category of acts and is without prejudice to the question of limits and exceptions to immunity that will be addressed elsewhere in the draft articles.

Article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Commentary

(1) Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, which refers to the beneficiaries of immunity *ratione materiae*. Both draft articles determine the general regime applicable to this category of immunity.

(2) Draft article 6 has a parallel content to that used by the Commission for draft article 4 on the scope of immunity *ratione personae*. In draft article 6, the order of the first two paragraphs has been changed, with the reference to the material element appearing first (acts covered by immunity) and the reference to the temporal element (duration of immunity) afterwards. In so doing, the intent is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting that acts performed in an official capacity are central to this category of immunity. Even so, it should be borne in mind that the scope of such immunity must be understood by looking at the material aspect (paragraph 1) in conjunction with the temporal aspect (paragraph 2). Furthermore, draft article 6 contains a paragraph on the relationship between immunity

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believed that they were official acts that benefited from immunity. Lord Browne-Wilkinson and Lord Hutton stated that torture cannot be "a public function" or a "governmental function". Lord Goff, dissenting, concluded that it was a "governmental function", while similar statements were expressed by Lord Hope ("criminal yet governmental"), Lord Saville (who referred to "official torture"), Lord Millett ("public and official acts") and Lord Philips ("criminal and official"). See also *Jones v. Saudi Arabia* (see footnote 1415 above)(and *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.).

[1435] Re *Pinochet*, Examining Magistrate of Brussels, judgment of 6 November 1998, ILR, vol. 119, p. 345; *Bouterse* (see footnote 1426 above); *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia (Greece), judgment of 30 October 1997.

ratione materiae and immunity *ratione personae*, in similar fashion to draft article 4, which it complements.

(3) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed in an official capacity, as the concept was defined in draft article 2 (f).[1436] Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies to both categories of acts.

(4) Although the purpose of paragraph 1 is to emphasize the material element of immunity *ratione materiae*, the Commission decided to include a reference to State officials to highlight the fact that only such officials may perform one of the acts covered by immunity under the draft articles. This makes clear the need for the two elements (subjective and material) to be present in order for immunity to be applied. It was not considered necessary, however, to make reference to the requirement that the officials be "acting as such", since the status of the official does not affect the nature of the act, but rather the subjective element of immunity and was already provided for in draft article 5.[1437] Nevertheless, these provisions were provisionally adopted on the understanding that it might be necessary, at a later date, to formulate more clearly draft article 5, which uses the expression "acting as such", as well as draft article 6, paragraph 1, which does not use it.

(5) The material scope of immunity *ratione materiae* as set out in draft article 6, paragraph 1 does not prejudge the question of exceptions to immunity, which will be dealt with elsewhere in the present draft articles.

(6) Paragraph 2 refers to the temporal element of immunity *ratione materiae*, by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Thus, although it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,[1438] has not been challenged in practice and is generally accepted in the literature.[1439]

[1436] See above draft article 2 (f) provisionally adopted by the Commission and the commentary thereto.

[1437] See para. (4) of the commentary to draft article 5, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 237.

[1438] See, *a contrario sensu*, para. (19) of the commentary to draft article 2, para. 1 (b) (v) of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated." (*Yearbook ... 1991*, vol. II (Part Two), p. 18).

[1439] See Institute of International Law, resolution entitled "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law", which sets out — *a contrario sensu* — the same position in its art. 13, paras. 1-2 (*Yearbook*, vol. 69 (Session of Vancouver, 2001), pp. 743 *et seq.*, in particular p. 753); and "Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes" art. III, paras. 1-2, *ibid.*, vol.

(7) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity "continues to subsist after the individuals concerned have ceased to be State officials", following the model used in the 1961 Vienna Convention on Diplomatic Relations[1440] and the 1946 Convention on the Privileges and Immunities of the United Nations.[1441] The expressions "continues to subsist" and "have ceased to be State officials" are drawn from those treaties. Furthermore, the Commission used the term "individuals" to reflect the definition of "State official" in draft article 2 (e).[1442]

(8) Lastly, it should be noted that although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae* and in order to avoid a broad interpretation of the permanent character of this category of immunity which could be argued to apply to other acts.

(9) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 6, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship albeit in the form of a "without prejudice" clause.

(10) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that "after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases".[1443] However, such "cessation … is without prejudice to the application of the rules of international law concerning immunity *ratione materiae* …" (draft article 4, paragraph 3). As the Commission stated in the commentary to the paragraph "it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during their

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73 (Session of Naples, 2009), pp. 226 *et seq.*, in particular p. 227). The resolutions are available on the website of the Institute: www.idi-iil.org.

[1440] Article 39, paragraph 2 of the Convention provides: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." (Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, in particular p. 118).

[1441] Article IV, section 12 of the Convention provides: "In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members." (Convention on the Privileges and Immunities of the United Nations, United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, in particular p. 22). The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model, in article V, section 14, it provides: "in order to secure for the representatives of members of the specialized agencies at meeting convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties." (*ibid.*, vol. 33, No. 521, p. 261, in particular p. 272).

[1442] For the meaning of the term "individual", see para. (4) of the commentary to draft article 2 (e), *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 232.

[1443] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), p. 67 (para. (2) of the commentary to draft article 4).

term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*".[1444] The Commission also stated: "This does not mean that immunity *ratione personae* is prolonged past the end of term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the 'without prejudice' clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible."[1445]

(11) This is precisely the situation referred to in paragraph 3 of draft article 6. The paragraph proceeds on the basis that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae* which, in practical terms, includes the same effects as immunity *ratione materiae*. It does not prevent the State officials, after their term in office has ended, from enjoying immunity *ratione materiae, stricto sensu*. This reflects the understanding of the Commission in the commentary to draft article 5, in which it states: "Even though the Commission considers that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione materiae stricto sensu* only once they have left office, there is no need to mention this in draft article 5. The matter will be covered more fully in a future draft article on the substantive and temporal scope of immunity *ratione materiae*, to be modelled on draft article 4."[1446]

(12) To this end the requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official acting as such (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during their term of office. The purpose of draft article 6, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said "does not prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part III of the draft articles".[1447]

(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission considered that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy both immunity *ratione personae* and immunity *ratione materiae*. Other members of the Commission emphasized that, for the purposes of these draft articles, immunity *ratione personae* is general and broader in scope and encompasses immunity *ratione materiae*, since it applies to both private and official acts. For these members, such officials enjoy only immunity *ratione personae* during their term of office, and only after their term of office has come to an end will they enjoy immunity *ratione materiae*, as provided for draft article 4 and reflected in the commentaries to draft articles 4 and 5. While favouring one or other option might have consequences before the national courts of certain States (in particular with regard to the conditions for invoking immunity before these tribunals), such consequences would not extend to all national legal systems. During the debate, some members of the Commission

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[1444] *Ibid.*, p. 70 (para. (7) of the commentary).

[1445] *Ibid.*

[1446] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 237 (para. (4) of the commentary).

[1447] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), p. 70 (para. (7) of the commentary to draft article 4).

expressed the view that it was not necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto.

(14) Although the Commission took account of this interesting debate, which mainly concerned theoretical and terminological issues, it decided to retain draft article 6, paragraph 3, particularly in view of the practical importance of the paragraph, whose purpose is to clarify, in operational terms, the regime applicable to individuals who enjoyed immunity *ratione personae*, after their term of office has ended (Head of State, Head of Government and Minister of Foreign Affairs).

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (article 39, paragraph 2) and the Convention on the Privileges and Immunities of the United Nations (article IV, section 12), which governed similar situations to those covered in the paragraph in question, namely: the situation of persons who enjoyed immunity *ratione personae*, after the end of their term of office, with respect to acts performed in an official capacity during such term of office.[1448] The Commission has used the expression "continue to enjoy immunity" in order to reflect the link between the moment when the act occurred and when immunity is invoked. Like the treaties on which it is based, draft article 6, paragraph 3 does not qualify immunity, but confines itself to the use of the generic term. Yet although the term immunity is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their term of office has ended.

[1448] See footnotes 1413 and 1414 above.

Chapter XII
Provisional application of treaties

A. Introduction

251. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic.[1449] At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic under his chairmanship.[1450] The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

252. At its sixty-fifth session (2013), the Commission had before it the first report of the Special Rapporteur (A/CN.4/664), which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat (A/CN.4/658), which traced the negotiating history of article 25 of the 1969 Vienna Convention on the Law of Treaties (hereinafter, the "1969 Vienna Convention"), both in the Commission and at the Vienna Conference in 1968 and 1969, and included a brief analysis of some of the substantive issues raised during its consideration.

253. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/675), which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

254. At its sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (A/CN.4/687), which continued the analysis of State practice, and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. The Commission referred six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. The Commission subsequently received an interim oral report for information only,[1451] presented by the Chairperson of the Drafting Committee, on draft guidelines 1 to 3, which had been provisionally adopted by the Drafting Committee.[1452]

[1449] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267.

[1450] *Ibid.*, paras. 144-155.

[1451] The statement of the Chairperson of the Drafting Committee is available on the website of the Commission (http://legal.un.org/ilc).

[1452] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 251.

B. Consideration of the topic at the present session

255. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/699 and Add.1), which continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention and of the practice of international organizations with regard to provisional application. The addendum contained examples of recent European Union practice on provisional application of agreements with third States. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty.[1453]

256. The Commission considered the fourth report at its 3324th to 3329th meetings, held from 20 to 27 July 2016. At its 3229th meeting, on 27 July 2016, the Commission referred draft guideline 10, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee.

257. At its 3342th meeting, on 9 August 2016, the Chairperson of the Drafting Committee presented the report of the Drafting Committee on "Provisional application of treaties", containing draft guidelines 1 to 4 and draft guidelines 6 to 9, as provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions of the Commission, respectively (A/CN.4/L.877). The Commission took note of the draft guidelines as presented by the Drafting Committee.[1454] It is anticipated that the Commission will take action on the draft guidelines and commentaries thereto at the next session.

[1453] The text of draft guideline 10, as proposed by the Special Rapporteur in his fourth report, reads as follows:

Draft guideline 10
Internal law and the observation of provisional application of all or part of a treaty

A State that has consented to undertake obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule is without prejudice to article 46 of the 1969 Vienna Convention.

[1454] The text of the draft guidelines provisionally adopted by the Drafting Committee reads as follows:

Draft guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Draft guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Draft guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.

Draft guideline 4
Form

In addition to the case where the treaty so provides, the provisional application of a treaty or part of a treaty may be agreed through:

(a) a separate agreement; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference.

258. At its 3347th meeting, held on 12 August 2016, the Commission decided to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

1. Introduction by the Special Rapporteur of the fourth report

259. The Special Rapporteur, in introducing his fourth report, began by providing a recapitulation of the previous work undertaken on this topic. He also drew attention to the interest that States have shown for the topic, referring both to the debate in the Sixth Committee and to States' submission of information in response to the questions contained in chapter III of the Commission's report.

260. The fourth report continued the analysis of the relationship between provisional application of treaties and other provisions of the 1969 Vienna Convention, with the aim of shedding more light on the legal regime of the former. The focus was placed on analysing the relationship between provisional application and the provisions on reservations, invalidity of treaties, termination or suspension of the operation of a treaty as a consequence of its breach under article 60, State succession, State responsibility, and an outbreak of hostilities under article 73.

261. As regards reservations, the Special Rapporteur observed that he had not found any treaty that provided for the formulation of reservations as from the time of provisional application, nor any provisional application provision that referred to the possibility of formulating reservations. The question was whether it was possible for a State to formulate reservations at the time of agreeing to provisional application in cases in which the treaty

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Draft guideline 5*

[…]

(* The Drafting Committee decided to keep draft guideline 5 in abeyance and to return to it at a later stage.)

Draft guideline 6

Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Draft guideline 7

Legal effects of provisional application

The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Draft guideline 8

Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Draft guideline 9

Termination upon notification of intention not to become a party

Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

was silent thereon. In the Special Rapporteur's view, nothing seemed to prevent a State from formulating reservations from the moment it decided to provisionally apply a treaty for two reasons. First, provisional application of treaties produces legal effects. Second, the purpose of reservations was precisely to exclude or modify the legal effects of certain provisions for a State.

262. The Special Rapporteur observed that he had decided to analyse the relationship that may exist between provisional application and the regime of invalidity of treaties, taking into account the suggestion made by both States and Commission members. He focused on the relationship between provisional application and article 46 of the 1969 Vienna Convention, in light of article 27, which he had addressed in his third report. He concluded, first, that the principle that a State cannot invoke its internal law as a justification for its failure to perform a treaty also applied with respect to treaties that were provisionally applied. Thereafter, he proceeded to examine the limits of provisional application under internal law in light of article 46. He recalled that this issue had been raised in the arbitral awards of the *Yukos*[1455] and *Kardassopoulos*[1456] cases, but noted that it would be premature to draw any conclusions, considering, in particular, that there could be more developments in the *Yukos* case. Nevertheless, from the point of view of international law, the Special Rapporteur considered it possible to conclude that, in addition to the regime established under article 27 of the 1969 Vienna Convention, States should make sure that there were no limitations relating to their competence to conclude treaties in accordance with article 46, when agreeing to provisional application, in order to give legal certainty to such provisional application.

263. Concerning the termination or suspension of a treaty as a result of a material breach, the Special Rapporteur reiterated his view that provisionally applied treaties produce legal effects as if the treaties were in force, thus producing obligations that needed to be complied with under the principle of *pacta sunt servanda*. As such, the circumstances concerning termination or suspension of a treaty as provided for in article 60 of the 1969 Vienna Convention were also relevant for provisionally applied treaties.

264. Turning to the question of the succession of States and provisional application of treaties, the Special Rapporteur noted that the articles on the provisional application of treaties contained in the Vienna Convention on Succession of States in Respect of Treaties (hereinafter, the "1978 Vienna Convention"),[1457] illustrated the practical utility of such provisions in enhancing legal certainty in situations of political instability. He therefore concluded that this issue did not merit a different treatment for the purpose of the current topic.

265. Section III of the report contained information on the practice of international organizations in relation to provisional application of treaties. The Special Rapporteur described the depositary practice of the United Nations and the registration of treaties under Article 102 of the Charter of the United Nations with regard to provisional application. Noting the relevance of such practice in obtaining a clearer understanding of provisional application on the basis of State practice, the Special Rapporteur suggested that the

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[1455] Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) and the Russian Federation*, interim award on jurisdiction and admissibility, 30 November 2009, Case No. AA 227; see also the joined cases in The Hague District Court, *The Russian Federation v. Veteran Petroleum Limited, The Russian Federation v. Yukos Universal Limited and The Russian Federation v. Hulley Entreprises Limited* (C/09/477160/HA ZA 15-1; C/09/477162/HA ZA 15-2; C/09/481619/HA ZA 15-112), 20 April 2016).

[1456] International Centre for Settlement of Investment Disputes (ICSID), *Ioannis Kardassopoulos and Georgia*, decision on jurisdiction, 6 July 2007, Case No. ARB/05/18.

[1457] Vienna, 23 August 1978, United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

Commission might wish to recommend to the Sixth Committee that the 1946 regulations on registration of treaties[1458] be updated to better reflect contemporary practice.

266. The fourth report contained one draft guideline on internal law and the observation of provisional application of all or parts of a treaty, and reflected article 27 of the 1969 Vienna Convention. It aimed to complete the previously proposed guideline on the legal effects of provisional application, while also taking into account article 46 of the 1969 Vienna Convention.

267. Concerning future work on the topic, the Special Rapporteur observed that he intended to address certain pending issues, such as the provisional application of treaties that enshrine the rights of individuals, and propose model clauses.

2. Summary of the debate

(a) General comments

268. Generally, members reiterated that the provisional application of treaties constituted an important aspect of the law of treaties, and the topic was of great practical significance for States. Some members observed that the information and analysis in the report were interesting and served to shed further light on the regime of provisional application. However, other members were of the view that more examples of practice were needed in order to substantiate the conclusions drawn. Furthermore, recognizing that the aim of section II of the report had been to address questions raised by Member States, which was important, several members nevertheless stressed that the Commission needed to approach the topic in a comprehensive and systematic manner.

269. Concerning methodology, some members welcomed the analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention. They noted, however, that, while agreeing in general with the conclusions, many of them were reached by way of analogy, while the practice behind them was not always clear. In addition, it was pointed out that it was not clear in what way the analysis undertaken by the Special Rapporteur would be reflected in the outcome of the topic: for example, whether there would be one guideline regarding each article analysed or an overarching guideline regarding the relationship between article 25 and other articles of the 1969 Vienna Convention. Doubts were also expressed by several members concerning the value of this methodological approach. In this regard, the view was expressed that it would be useful to analyse whether article 25 of the 1969 Vienna Convention was partly or wholly a self-contained regime within the Convention. It was recalled that various proposals considered at the Vienna Conference, in particular with regard to the question of termination of provisional application, seemed to support such a proposition. If it were to be concluded that article 25 was a wholly self-contained regime, the other articles, while not being of direct relevance, could provide some guidance by analogy.

270. Other members were of the view that the direction of the topic depended on whether or not the 1969 Vienna Convention applied to provisional application. They did not agree with the assumption that article 25 constituted, in whole or in part, a self-contained regime, with the possible exception of paragraph 2 governing the termination of provisional application. They stressed that provisional application of a treaty, although provisional, was nonetheless an application of a treaty. In their view, it was therefore futile to analyse the

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[1458] See Regulation to give effect to Article 102 of the Charter of the United Nations, adopted by the General Assembly on 14 December 1946 (United Nations, *Treaty Series*, vol. 1, p. XVI), as modified by resolutions 364 (IV) B of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 A of 19 December 1978.

relationship between provisional application and the provisions of the 1969 Vienna Convention. To the extent that the provisions of the 1969 Vienna Convention applied to a treaty in force, they were also applicable to a treaty being applied provisionally, with one important qualification — the rights and obligations of a State provisionally applying the treaty depended on the terms of the agreement providing for provisional application. However, the view was also expressed that it could not simply be presumed that the legal effects of the provisional application of a treaty were exactly the same as those deriving from a treaty that was in force. It was suggested that a comparative analysis of conventional practice would assist in clarifying the matter.

271. In addition, while it was observed that several of the provisions of the 1969 Vienna Convention could be of relevance for the topic, caution was expressed by some members against reaching conclusions by simple analogy without taking account of State practice. It was regretted that no comprehensive overview of conventional practice regarding provisional application had been provided, without which it was difficult to fully understand the intricacies of the topic. While it was acknowledged that it was not the Commission's task to codify the entire conventional practice that existed in relation to provisional application, which seemed to be both wide-ranging and diverse, the Commission could usefully contribute to the topic by addressing the circumstances when the treaty or agreement providing for provisional application was silent.

272. Some members observed further that it was important, when considering provisional application, to take into account the different nature and characteristics of each treaty. Open and closed multilateral treaties and bilateral agreements might raise different issues that needed to be carefully examined. That was equally true for treaties establishing international organizations.

(b) Reservations

273. Concerning the relationship between provisional application and the reservation regime under the 1969 Vienna Convention, some members reiterated that provisional application of a treaty produced the same legal effects as if the treaty were in force. Consequently, they agreed with the Special Rapporteur's assertion that nothing would prevent a State, in principle, from formulating reservations as from the time of its agreement to the provisional application of a treaty. In addition, it was observed that it could be presumed that a State that had formulated a reservation intended it to apply not only when the treaty entered into force, but also to the provisional application of the treaty. It was suggested that such presumption be reflected in the draft guidelines. In terms of another view, article 19 of the 1969 Vienna Convention, which stipulated when reservations could be formulated, did not refer to provisional application. Accordingly, formulating a reservation as from the time of the agreement to provisionally apply a treaty would be inconsistent with article 19 of the 1969 Vienna Convention.

274. Furthermore, some understood the report as examining the question of reservations to an agreement to apply a treaty provisionally rather than addressing reservations to the treaty itself. It was suggested that it would have been better to have examined whether a reservation to a treaty could exclude or modify the treaty, not only after its entry into force but also during its provisional application. It was also pointed out that declarations whereby a State agreed to apply a treaty provisionally within the limits of its internal law, in cases where the treaty was silent on such limiting provisions, could be considered to constitute reservations.

275. Some members observed that the analysis on reservations had been limited to article 19 of the 1969 Vienna Convention and expressed the hope that the Special Rapporteur would examine the other relevant rules under the Convention. It was also noted that the formulation of reservations in relation to provisional application raised other complex but

practical questions that merited further consideration, including regarding the form, nature and effects of such reservations. In addition, some members considered that the question of reservations in relation to provisional application was not devoid of practical examples, and several references were made to reservations formulated in the context of multilateral commodity agreements. Attention was also drawn to the Guide to practice on reservations to treaties,[1459] which also contained, together with its commentaries, some useful elements, in particular guidelines 2.2.1, 2.2.2 and 2.6.11. It was recommended that the question on reservations in the context of provisional application be further examined and possibly reflected in the draft guidelines.

(c) Invalidity of treaties

276. Some members welcomed the examination of the question of the relevance of internal law for provisional application. They observed that in doing so, the Special Rapporteur had focused on one aspect of the 1969 Vienna Convention, namely on article 46 concerning the provisions of internal law regarding competence to conclude treaties. They also found the discussion in the report on the *Yukos* case timely and agreed with the Special Rapporteur that the Commission should not attempt to reach any conclusions with respect to the case, on the one hand, because it was ongoing, and, on the other, because it was based on a treaty regime that could not be generalized. Several members, however, pointed out that the Special Rapporteur had not, in his analysis concerning internal law, fully clarified the different situations involved or the legal consequences that resulted therefrom. In that regard, it was observed that while article 46 of the 1969 Vienna Convention was an important part of the topic, articles 27 and 46 therein constituted an integral whole and provided evidence that internal rules of fundamental importance were integrated in the proper appreciation of the law of treaties. In order to fully appreciate the interplay between international law and internal law in the context of provisional application, it was suggested that three different situations needed to be distinguished. The first was where an agreement on provisional application itself qualified provisional application by reference to internal law, in which case the latter was relevant for understanding the scope of the agreement on provisional application. The question was not about validity or invalidity of a treaty or of primacy of international or internal law but one of treaty interpretation. The second situation was analogous to article 46, that is where a State argued that its consent to be bound by the agreement was invalid because of a provision of its internal law regarding its competence to conclude international agreements. The third situation was equivalent to article 27 and concerned the situation where a State sought to invoke its internal law as a justification for its failure to perform its international obligations. Some members stressed that it was the first scenario that was often the most important, and contentious, aspect of provisional application. It was therefore considered essential that the issue be reflected in the draft guidelines, on the basis of further analysis.

277. In addition, several members were of the view that articles 27 and 46 applied to provisional application and should also be reflected in the draft guidelines. However, the view was also expressed that it was necessary to analyse the relevance of internal law in relation to provisional application differently from when a treaty was in force, while taking into account the question whether provisional application produced legal effects that other States relied on. It was suggested that the question of whether or not the term "manifest" in article 46 should be interpreted in a more flexible manner in the case of provisional application be examined, taking into account State practice. Furthermore, some members observed that applying procedural guarantees and limitations concerning the consent to be

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[1459] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. IV, sect. F, and for the commentary thereto, *ibid.*, addendum 1 (A/66/10/Add.1).

bound by a treaty *mutatis mutandis* to provisional application would render the regime of provisional application meaningless. In many cases, provisional application was resorted to precisely because the constitutional procedures to be bound by the treaty had not yet been completed. Only if a decision to provisionally apply a treaty contradicted an internal rule of fundamental importance concerning the competence to be bound by a treaty would it be possible to talk about invalidity.

(d) Termination or suspension of the operation of a treaty as a consequence of its breach

278. Regarding termination of provisional application, some members agreed with the conclusion of the Special Rapporteur that article 60 could apply to provisional application on the basis that it produced the same legal effects as if the treaty were in force. At the same time, however, the view was expressed that it was unlikely that a State would make use of the procedure that was envisaged in article 60, when article 25, paragraph 2, provided a less burdensome alternative.

279. Some members pointed out that article 25, paragraph 2, implied a different and more flexible regime than the one set forth in the 1969 Vienna Convention with regard to treaties that were in force. It was recalled that the diplomatic conference leading to the 1969 Vienna Convention incorporated the termination clause in article 25 rather than relying on the general termination provisions included in the Convention. The view was expressed that article 25, paragraph 2, established the exclusive means by which a State could, on its own initiative, end its obligation to apply the treaty provisionally. In that respect, at least with regard to termination, provisional application constituted a self-contained regime. It was nevertheless also observed that unlike the other termination rules in the 1969 Vienna Convention, article 60 was also relevant with regard to provisional application since the two articles operated in different ways. While article 25, paragraph 2, would bring to an end any effects which the treaty had with respect to the State notifying the termination in its relations with the notified States, article 60 could be invoked as a ground for suspending or terminating the provisional application of a treaty only in relation between the affected State and the defaulting State.

280. Regarding the analysis of the relationship between provisional application and article 60 of the 1969 Vienna Convention, it was recalled that its paragraph 3 provided for conditions under which a material breach of a treaty occurred after its entry into force. It was pointed out that the Special Rapporteur should therefore have addressed the question whether a material breach of a treaty that was provisionally applied could occur under the same circumstances as those provided for in article 60. In addition, it was observed that the report had not distinguished between the termination of the treaty as such and the termination of provisional application, the latter resulting in the suspension of a treaty provided for in the same provision. As a consequence, the question whether a material breach of a treaty that was provisionally applied entitled the parties to invoke the breach as a ground for not only suspending the provisional application of the treaty but also for terminating the treaty itself had not been addressed. It was suggested that the analysis of articles 25 and 60 be further elaborated on the basis of State practice, with a view to formulating draft guidelines reflecting both the issue of termination and that of suspension, thereby clarifying how the relationship among the various parties was affected.

281. Furthermore, concerning the question of what type of violation constituted a material breach for the purpose of article 60, paragraph 3, it was pointed out that the Special Rapporteur's conclusion that a trivial violation of a provision that was considered essential could constitute such a breach was not entirely correct. Attention was drawn to a recent award in which an Arbitral Tribunal had concluded that termination of a treaty due to a material breach was warranted only if the breach defeated the object and purpose of the treaty. It was, however, also suggested that the question of whether or not the term

"material breach" in article 60 should be interpreted in a more flexible manner in the case of provisional application be examined. In addition, the view was expressed that it was not possible to talk about material breach in the context of provisional application but rather of non-performance of treaty obligations and that the effects of a material breach under article 60 of the 1969 Vienna Convention were not applicable since no contractual treaty relationship existed at that time. The view was also expressed that the relationship between provisional application and other forms of termination provided for in the 1969 Vienna Convention also merited consideration.

(e) Cases of succession of States, State responsibility and outbreak of hostilities

282. Some members agreed with the Special Rapporteur that while the information contained in the fourth report on State succession was important, it was not necessary to address such questions further, for the purpose of the topic. Attention was nevertheless drawn by some other members to the relevant articles in the 1978 Vienna Convention, which took into account the nature and the characteristics of the treaty, in particular whether it was a bilateral agreement or an open or closed multilateral treaty, and whether the treaty in question was in force. It was also suggested that an examination of State practice would be valuable. Furthermore, some members supported addressing the question of succession in the draft guidelines.

(f) Draft guideline 10

283. Concerning draft guideline 10, some members recognized that it was based on article 27 of the 1969 Vienna Convention and therefore unobjectionable as such. Others were of the view that the draft guideline needed to be broadened to take into account situations in which the agreement to provisionally apply a treaty limits the provisional application by referring to internal law.

284. Some members, however, expressed regret that the report did not fully substantiate the content of the draft guideline. For example, it was unclear whether the draft guideline reflected the rule set forth in article 27 that a State may not invoke its internal law to justify a failure to perform a treaty, or whether it concerned provisions of internal law regarding the competence to agree to apply a treaty provisionally, as the reference to article 46 seemed to indicate. Some members noted that the draft guideline could be understood to imply that internal law was always irrelevant and ignored the fact that States may limit the provisional application of treaties by making reference to internal law. This was distinct from the impermissible invocation of internal law as provided for in article 27 and it was considered important that the issue be reflected in the draft guidelines. The view was also expressed that article 46 of the 1969 Vienna Convention should be further elaborated in the draft guideline and that it was not sufficient to limit it to a clause without prejudice. Consequently, the draft guideline should address situations analogous to both articles 27 and 46.

285. Some members expressed the view that instead of incorporating certain provisions from the 1969 Vienna Convention into the draft guidelines, as draft guideline 10 attempted to do, it might be more appropriate to have a general guideline indicating that unless excluded by the agreement providing for provisional application, the provisions of the 1969 Vienna Convention, to the extent relevant, applied to the provisional application of a treaty.

(g) Practice of international organizations in relation to application of treaties

286. Several members found the information in the report pertaining to the practice of international organizations interesting. The Special Rapporteur was encouraged to expand the section on regional organizations, in particular regarding the African Union, to ensure a more inclusive approach. However, they observed that it was unclear what conclusions

could be drawn from the information provided. Other members considered that the information provided was pertinent for the purpose of better understanding State practice. It was also pointed out that two very different forms of practice were discussed. Some members were of the view that whereas the information concerning the practice related to registration, depository and publication of treaties did not seem relevant for the topic, the information on treaties to which an organization was a party was highly pertinent. It was this latter category that should be further elaborated. In that regard, some members called for a more in-depth comparative study on the provisional application of treaties involving States, on the one hand, and those involving international organizations, on the other hand.

287. Concerning the proposal for a recommendation to revise regulations and manuals of the Secretariat with regard to its registration and depository functions, some members doubted that the matter fell within the scope of the topic. While the view was also expressed that such a revision would be of value, it was suggested that the question could be considered at a later stage.

(h) Future work

288. Regarding future work on the topic, it was suggested that an exhaustive treatment of treaty provisions providing for provisional application was essential in order to gain a more in-depth understanding of the topic. It was observed that there seemed to be extensive State practice relevant for the topic and undertaking a comparative analysis of relevant treaty provisions could assist in understanding provisional application and its relationship with the full application of a treaty. In addition, it was pointed out that a comparison of provisions in agreements providing for provisional application that condition such application on internal law would be particularly useful.

289. The view was expressed that future work should also provide conclusions of the analysis already undertaken in respect of the relationship between provisional application and other provisions of the 1969 Vienna Convention. It was further suggested that the questions of interpretative declarations made by States provisionally applying a treaty and declarations made by States purporting not to apply a treaty provisionally could be examined in future reports.

290. Concerning the Special Rapporteur's proposal to examine the question of application of treaties that enshrine the rights of individuals, the view was expressed that the matter should be addressed with great care, taking into account State practice.

291. Several members welcomed the Special Rapporteur's intention to prepare model clauses. Caution was nevertheless advised against attempting to analyse the meaning of each clause, which could affect the meaning already ascribed by States to such clauses in existing treaties. It was also pointed out that it may be more appropriate to develop an indicative list of model clauses.

3. Concluding remarks of the Special Rapporteur

292. The Special Rapporteur recalled that, from the outset of the Commission's consideration of the topic, a majority of the members had stressed the need to examine the relationship between article 25 of the 1969 Vienna Convention and its other provisions. Some members had indicated which provisions, in their view, were particularly relevant for this purpose, including articles 46 and 60. Such an analysis had been considered pertinent in order to shed more light on the regime of provisional application. It had been on this basis that the Special Rapporteur had prepared his fourth report. He indicated that this exercise would be completed in the fifth report, in which he would possibly address the relationship between provisional application and article 34 of the 1969 Vienna Convention, concerning third States. While he did not intend to propose a draft guideline for every

provision of the Convention that had been examined, he stressed that, together, the reports would serve to provide a better understanding of which articles were most relevant for the provisional application regime and, ultimately, provide the wider context in which article 25 operates.

293. The Special Rapporteur observed that several members had emphasized the practical value of this topic to States. While he agreed that the topic had to be treated systematically, he also considered it important to take into account and reflect the views and concrete proposals of States in developing the topic.

294. The Special Rapporteur did not agree with the suggestion that article 25 may constitute a self-contained regime since such a proposition may negatively affect the notion of the universality of international law and limit the legal effects that had been identified with regard to provisional application. The Commission should not address the topic as a matter of *lex specialis*. If, instead, it was recognized that a provisionally applied treaty produced legal effects as if the treaty were in force, as it had indeed been acknowledged, the task would then be to identify the rules under general international law that would apply in concrete situations and thereby provide guidance to States. In this regard, the Special Rapporteur found the proposal of elaborating a general draft guideline that would provide that the 1969 Vienna Convention applied *mutatis mutandis* to provisionally applied treaties interesting.

295. The Special Rapporteur further noted that in considering the topic, drawing conclusions based on analogy had been warranted in the circumstances since, according to him, practice had been scarce or inaccessible. This methodology was not unusual.

296. While the Special Rapporteur fully agreed that it would be useful to undertake a comparative analysis of treaties providing for provisional application, he recalled the difficulties he had encountered in obtaining the relevant information. He elaborated on the relevance of the information provided by the Treaty Section of the Office of Legal Affairs in this regard. He explained that the Treaty Section had had to develop a specific tool in order to conduct the search that led to the identification of treaties that contain provisional application clauses, but clarified that such information is not accessible to external users. Likewise, he underscored that it was very difficult to identify all actions regarding provisional application given the limitations of the search criteria of the Treaty Series. The added value of the information provided in the fourth report was that it showed that there was a large number of treaties apparently containing provisional application clauses, as well as registration of actions linked to provisional application; at the same time, it revealed the difficulty of obtaining such information. This was why it had not yet been possible to obtain a picture of practice on the subject.

297. The Special Rapporteur further underlined that the Commission seemed to be overlooking the fact that the regulations for the registration of treaties, the *Repertory of Practice of United Nations Organs*[1460] and the manuals on treaty law and practice[1461] were developed, not on the basis of the legal regime established by article 25, but on criteria that predated the 1969 Vienna Convention. This had an impact on the practice of States since they used such documents as a guide when referring to provisional application. Moreover, since advice given by the Treaty Section to States upon request also followed those criteria,

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[1460] Available from www.un.org/law/repertory.

[1461] *Treaty Handbook* (United Nations publication, Sales No. E.12.V.1); *Final Clauses of Multilateral Treaties — Handbook* (United Nations publication, Sales No. E.04.V.3); and *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1, United Nations publication, Sales No. E.94.V.15).

it had the potential of misleading them. Therefore, State practice may very well deviate from the legal regime established under article 25.

298. As regards information reflecting the practice of regional organizations, the Special Rapporteur agreed that it would be useful to expand this section to include the African Union.

299. As regards the discussion on reservations, the Special Rapporteur reiterated that he had not, in the debate or in the research, come across any provision that specifically addressed the possibility of formulating a reservation in relation to provisional application. While some of the examples referred to during the debate merited further examination, others did not, in his view, constitute reservations as such. He further reiterated that the guide on reservations is silent regarding provisional application and that paragraph (5) of the commentary to guideline 2.2.2 vaguely addressed this issue, as a hypothetical possibility, without referring to any practice on the matter.

300. The Special Rapporteur reiterated that articles 27 and 46 of the 1969 Vienna Convention, while referring to the internal law of States, indeed referred to two different aspects but that they created a complementary regime. He then concurred with those members who considered that both articles 27 and 46 should be reflected in the draft guidelines and noted that this had been his intention with draft guideline 10. Furthermore, he also agreed that future draft guidelines should address situations in which the agreement to provisionally apply a treaty limited the provisional application of a treaty by referring to internal law.

Chapter XIII
Other decisions and conclusions of the Commission

A. Requests by the Commission for the Secretariat to prepare studies on two topics in the Commission's agenda

301. At its 3303rd meeting, on 24 May 2016, the Commission decided to request from the Secretariat a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.

302. At its 3347th meeting, held on 12 August 2016, the Commission decided to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

B. Programme, procedures and working methods of the Commission and its documentation

303. At its 3300th meeting, on 18 May 2016, the Commission established a Planning Group for the current session.

304. The Planning Group held four meetings. It had before it Section H, entitled "Other decisions and conclusions of the Commission", of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session; document A/71/6 (Prog. 6) Proposed strategic framework for the period 2018-2019: Programme 6, Legal affairs; General Assembly resolution 70/236 of 23 December 2015 on the Report of the International Law Commission on the work of its sixty-seventh session; and General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels.

305. At its 2nd meeting, on 8 June 2016, the Planning Group took note of the proposed Strategic Framework for the period 2018-2019 (A/71/6), covering subprogramme 3 (Progressive development and codification of international law) of programme 6 (Legal affairs).

1. Working Group on the Long-term Programme of Work

306. At its 1st meeting, on 3 June 2016, the Planning Group decided to reconstitute for the present session the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Donald M. McRae. The Working Group submitted its report on the work of the quinquennium to the Planning Group, at its 4th meeting, on 29 July 2016.

307. The Commission noted that it had already recommended during the present quinquennium the inclusion in its long-term programme of work of the topics (a) Crimes against humanity; and (b) *Jus cogens*. These two topics were already on the current programme of work of the Commission, included, respectively, at the sixty-fifth (2013)[1462] and sixty-sixth (2014)[1463] sessions of the Commission.

[1462] *Official Records of the General Assembly, Sixty-eighth Session Supplement No. 10* (A/68/10), paras. 169 and annex B.

[1463] *Ibid., Sixty-ninth Session Supplement No. 10* (A/69/10), paras. 268 and Annex.

308. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the following topics in the long-term programme of work of the Commission:

(a) The settlement of international disputes to which international organizations are parties; and

(b) Succession of States in respect of State responsibility.

309. In the selection of the topics, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[1464] The Commission considered that these two topics constitute useful contributions to the progressive development of international law and its codification. The syllabuses of the two topics selected appear as annexes A and B to the present report.

310. The Commission recalls that five other topics remain inscribed in the long-term programme of work from previous quinquennia, namely: (a) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction;[1465] (b) Jurisdictional immunity of international organizations;[1466] (c) Protection of personal data in trans-border flow of information;[1467] (d) Extraterritorial jurisdiction;[1468] and (e) The fair and equitable treatment standard in international investment law.[1469]

311. The Commission noted that the Working Group on the Long-term programme of work considered its methods of work, at the beginning of the current quinquennium, taking into account its long-standing practice in the selection of topics. The Commission noted that the Working Group on the Long-term Programme of Work had found that the established three-phase process, consisting of (a) identification of possible topics; (b) preparation of a short paper on a given topic; and (c) preparation of a more detailed syllabus, was a good basis for its work. This process allowed for a broad exchange of views on a given topic and, at the same time, provided a good means of ensuring a topic's feasibility. Moreover, while aware that the decision to place new topics on the Long-term Programme of Work had usually been taken at the end of the quinquennium, the Working Group considered it appropriate to make such decisions during the course of the present quinquennium.[1470]

312. The Commission also noted that it had identified the need to conduct a systematic review of the work of the Commission and a survey of possible future topics for consideration. To this end, in 2014, it had requested the Secretariat to review the illustrative

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[1464] *Yearbook ... 1998*, vol. II (Part Two), para. 553. See also *Yearbook ... 1997*, vol. II (Part Two), para. 238.

[1465] *Ibid.*, 1996, vol. II (Part Two), p. 97, para. 248 and Annex II, Addendum 2.

[1466] *Official Records of the General Assembly, Sixty-first Session Supplement No. 10* (A/61/10), para. 257 and Annex B.

[1467] *Ibid.*, Annex C.

[1468] *Ibid.*, Annex D.

[1469] *Official Records of the General Assembly, Sixty-sixth Session Supplement No. 10* (A/66/10), para. 365 and Annex D.

[1470] See para. 307 above.

general scheme of topics prepared by the Commission in 1996, in the light of subsequent developments and to prepare a list of potential topics for the Commission, accompanied by brief explanatory notes, by the end of the present quinquennium. In response to that request, the Secretariat had prepared two memorandums, the first in 2015 which reviewed the list of topics established in 1996 in the light of subsequent developments (A/CN.4/679), and the second for the present session concerning "Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments" (A/CN.4/679/Add.1), which contains six working papers setting out brief explanatory notes on potential topics for the Working Group's consideration.

313. The Commission welcomed the two memorandums prepared by the Secretariat, and took note of the six potential topics as proposed by the Secretariat, namely (a) "General principles of law"; (b) "International agreements concluded with or between subjects of international law other than States or international organizations"; (c) "Recognition of States"; (d) "Land boundary delimitation and demarcation"; (e) "Compensation under international law"; and (f) "Principles of evidence in international law". The Commission recommended that the six potential topics be further considered by the Working Group on the Long-term Programme of Work at the sixty-ninth session of the Commission (2017).

2. Consideration of General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels

314. The General Assembly, in resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented annually on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remain relevant and reiterates the comments made at its previous sessions.[1471]

315. The Commission recalls that the rule of law is of the essence of its work. The Commission's purpose, as set out in article 1 of its Statute, is to promote the progressive development of international law and its codification.

316. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims at promoting respect for the rule of law at the international level.

317. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law, as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.[1472]

[1471] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 231; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 390-393; *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 392-398; *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 274-279; *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 171-179; *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 273-280; *ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 288-295.

[1472] General Assembly resolution 67/1 of 30 November 2012 ("Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels"), para. 41.

318. In its current work, the Commission is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",[1473] without emphasizing one at the expense of the other. In this context the Commission is cognizant that the 2030 Agenda for Sustainable Development recognizes the need for an effective rule of law and good governance at all levels.[1474] In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law.

319. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,[1475] the Commission wishes to recall that much of its work consists in collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law.

320. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,[1476] the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.[1477]

321. In the course of the present session the Commission has continued to make its contribution to the rule of law, including by working on the topics "Protection of persons in the event of disasters" (adopted on second reading at the present session), "Immunity of state officials from foreign criminal jurisdiction", "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (adopted on first reading at the present session), "Provisional application of treaties", "Identification of customary international law" (adopted on first reading at the current session), "Protection of the environment in relation to armed conflicts", "Protection of the atmosphere", "Crimes against humanity" and "*Jus cogens*".

322. The Commission reiterates its commitment to the rule of law in all of its activities.

3. Consideration of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015 on the Report of the International Law Commission on the work of the sixty-seventh session

323. The Commission took note of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015. By the terms of paragraph 10 and 11 of the resolution, the Assembly noted that the Commission had affirmed its wish that consideration be given to the possibility of holding one half session in the next quinquennium in New York and had indicated that, taking into account the estimated costs and relevant administrative, organizational and other factors, such a possibility could be anticipated during the first segment of a session in either the first year (2017) or the second year (2018) of the next quinquennium. The Assembly took note of the recommendation made by the Commission in paragraph 298 of its 2015 report that preparatory work and estimates proceed on the assumption that the first segment of its seventieth session (2018) would be convened at United Nations Headquarters in New York, as well as of the request of the Commission that the Secretariat proceed to make the

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[1473] Report of the Secretary-General on Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, 11 June 2013, para. 70.

[1474] General Assembly resolution 70/1 of 21 October 2015, para. 35.

[1475] General Assembly resolution 70/118 of 18 December 2015, paras. 13 and 19.

[1476] General Assembly resolution 70/118 of 18 December 2015, para. 8.

[1477] See more specifically *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 294.

necessary arrangements for that purpose so as to facilitate the taking of the appropriate decision by the Commission at its sixty-eighth session, in 2016.

324. Upon being afforded further information by the Secretariat that, taking into account the estimated costs and relevant administrative, organizational and other factors, it would be feasible to hold one half session in the first year (2017) or the second year (2018) of the next quinquennium in New York, the Commission considered that holding such a half session during its seventieth session in 2018 would be the most convenient.

325. It was noted that 2017 would be the first year of the quinquennium for the membership of the Commission to be elected during the seventy-first session of the General Assembly. A session at its seat at the United Nations Office at Geneva would be optimal for new members as they transition into the work of the Commission. In addition, it was recognized that the Commission would be commemorating its seventieth anniversary session in 2018, and having part of its session in New York could serve the endeavours of further enhancing the dialogue between the Commission and the Sixth Committee.

326. Accordingly, the Commission recommends that it holds the first part of its seventieth session in New York, and requests the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate the holding of such a session in New York. Particular attention was drawn to the need to ensure access to library facilities at Headquarters, and electronic access to the resources and research assistance of the Library of the United Nations Office at Geneva. The need to ensure access and sufficient space for assistants to members of the Commission to attend meetings of the Commission was also emphasized.

4. Seventieth anniversary session of the International Law Commission

327. The Commission recommends that a seventieth anniversary event be held during its seventieth session in 2018. The anniversary event could be held in two parts, the first during the first part of its seventieth session in New York, and the second during the second part of its seventieth session in Geneva.

328. The Commission recommends that during the first part of its seventieth session that is recommended to be held in New York:

(a) a solemn half day meeting of the Commission be held at which would be invited high-level dignitaries;

(b) an informal half day meeting be held with delegates to the Sixth Committee of the General Assembly to exchange views on the work of the Commission, the relationship between the Commission and the Sixth Committee, and the role of both bodies in the promotion of the progressive development and codification of international law.

329. The Commission recommends that during the second part of its seventieth session in Geneva, a one and a half day conference be held with legal advisers of States and international organizations, academics and other distinguished international lawyers, dedicated to the work of the Commission.

330. The Commission also recommends that a report of these meetings shall be presented and discussed in an appropriate form at the annual meeting of the Legal Advisers in New York.

331. The Commission further recommends that the anniversary event leads to a publication.

332. The Commission requests the Secretariat, in consultation with the Chairperson of the Commission and the Chairperson of the Planning Group, to commence making arrangements for the holding of the commemorative event.

5. Honoraria

333. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which has been expressed in the previous reports of the Commission.[1478] The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research work.

6. Documentation and publications

334. The Commission reiterated its recognition of the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.[1479] It once more recalled that the Codification Division had previously been able to expedite significantly the issuance of its publications through its highly successful desktop publishing initiative which had greatly enhanced the timeliness and relevance of those publications to the Commission's work for more than a decade. The Commission expressed its strong concern at the curtailment and discontinuation of that initiative due to lack of resources, and its deep regret that consequently no new legal publications were distributed at its current session.

335. The Commission expressed its strong view that the resumption of this initiative was essential to ensure the timely issuance of these legal publications, in particular *The Work of the International Law Commission*, the early availability of which in the various official languages was a vital tool in the Commission's work, and accordingly the Commission called for the resumption of the desktop publishing initiative. The Commission again reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work, and reiterated its request that the Codification Division continue to provide it with those publications.

336. The Commission reiterated its satisfaction that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, would not be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in their more expeditious transmission to members of the Commission for timely correction and prompt release. The Commission called on the Secretariat to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission also welcomed the fact that these working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all languages, without compromising their integrity.

[1478] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525-531; *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 358; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 240; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396, and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 399; *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 280; *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 181; *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 281; and *ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 299.

[1479] See *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), paras. 387-395. See also *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 185.

337. The Commission expressed its gratitude to all Services involved in the processing of documents, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. In particular, the Commission noted with satisfaction that a number of experimental measures to streamline the editing of the Commission's documents were introduced following exchanges between the secretariat of the Commission and the Editing Section of the United Nations Office at Geneva. The new arrangements contributed to the improvement of the document considered by the Commission and facilitated its work.

338. The Commission expressed concern, however, that the issuance in all official languages of some reports of Special Rapporteurs had been delayed, thereby disrupting its programme of work. It noted that timely and efficient processing was essential for the smooth conduct of the Commission's work.

339. The Commission reaffirms its commitment to multilingualism and recalls the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which has been emphasized in General Assembly resolution 69/324 of 11 September 2015. This commitment is reflected, *inter alia*, in the established practice of the Commission to debate in plenary the reports of the Special Rapporteurs after they have been published in all official languages. In this regard, the Commission wishes to emphasize that the measures of a very exceptional character which have been resorted to during the present session with regard to the debate on the topic "Immunity of State officials from foreign criminal jurisdiction" (see Chap. XI) will not constitute, in any respect, a precedent.

340. In this respect, the Commission (a) requests the Secretariat to continue to ensure that official documents of the Commission are published in due time in the six official languages of the United Nations; and (b) requests Special Rapporteurs to submit their reports within the time limits specified by the Secretariat.

341. The Commission expressed its warm appreciation to the United Nations Office at Geneva Library, which continued to assist members of the Commission very efficiently and competently.

7. *Yearbook of the International Law Commission*

342. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 70/236, expressed its appreciation to governments that had made voluntary contributions to the Trust Fund on the backlog relating to the *Yearbook*, and encouraged further contributions to the Trust Fund.

343. The Commission recommends that the General Assembly, as in its resolution 70/236, *express its satisfaction* with the remarkable progress achieved in the last few years in catching up with the backlog of the *Yearbook* in all six languages, and welcome the efforts made by the Division of Conference Management, especially the Editing Section of the United Nations Office at Geneva, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and *encourage* the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

8. Assistance of the Codification Division

344. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and,

the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of memorandums on the Role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691), and on Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission (A/CN.4/698), and also in preparing six working papers on potential future topics for the Commission's long-term programme of work (A/CN.4/679/Add.1).

9. Websites

345. The Commission expressed its deep appreciation to the Secretariat for the website on the work of the Commission, and called on it to continue updating and managing the website.[1480] The Commission reiterated that the website and other websites maintained by the Codification Division[1481] constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as advance edited versions of the summary records of the Commission.

10. United Nations Audiovisual Library of International Law

346. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law in promoting a better knowledge of international law and the work of the United Nations in this field, including the International Law Commission.[1482]

C. Date and place of the sixty-ninth session of the Commission

347. The Commission decided that the sixty-ninth session of the Commission be held in Geneva from 1 May to 2 June and 3 July to 4 August 2017.

D. Cooperation with other bodies

348. At the 3317th meeting, on 8 July 2016, Judge Abraham, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[1483] An exchange of views followed.

349. The Inter-American Juridical Committee was represented at the present session of the Commission by a member of the Inter-American-Juridical Committee, Mr. Gélin Imanès Collot, who addressed the Commission at the 3305th meeting, on 26 May 2016.[1484] He gave an overview of the activities of the Committee on various legal issues concerning

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[1480] http://legal.un.org//ilc.

[1481] In general, available from: <http://www.un.org/law/lindex.htm>.

[1482] www.un.org/law/avl/.

[1483] This statement is recorded in the summary record of that meeting.

[1484] *Ibid.*

which the Committee was engaged, focusing in particular on the period 2015-2016. An exchange of views followed.

350. The Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe was represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public International Law, Mr. Paul Rietjens, and the Head of Public International Law Division and Treaty Office of the Directorate of Legal Advice and Public International Law, Ms. Marta Requena, both of whom addressed the Commission at the 3316th meeting, on 7 July 2016.[1485] They focused on the current activities of CAHDI in the field of public international law, as well of the Council of Europe. An exchange of views followed.

351. On 20 July 2016, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest. Following statements were made by the Director of International Law and Policy, ICRC and the Chairperson of the Commission, presentations were made on the topics "Crimes against Humanity" and "Protection of the environment in relation to armed conflicts". Further presentations were made on "Outcomes of the 32nd International Conference of the Red Cross and Red Crescent Movement", and "Interaction between IHL and the legal framework addressing counter-terrorism". These presentations were followed by discussion.[1486]

E. Representation at the seventy-first session of the General Assembly

352. The Commission decided that it should be represented at the seventy-first session of the General Assembly by its Chairperson, Mr. Pedro Comissário Afonso.

F. International Law Seminar

353. Pursuant to General Assembly resolution 70/236 of 23 December 2015, the fifty-second session of the International Law Seminar was held at the Palais des Nations from 4 to 22 July 2016, during the present session of the Commission. The Seminar is intended for young jurists specializing in international law, young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their countries.

354. Twenty-two participants of different nationalities, from all regional groups, took part in the session.[1487] The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

[1485] *Ibid.*

[1486] Statements were made by Ms. Helen Durham, Director of International Law and Policy, ICRC, Mr. P. Comissário Afonso, Chairperson of the Commission. The presentations on "Crimes against Humanity" were by Mr. Sean D. Murphy, and on "Protection of the environment in relation to armed conflicts" by Ms. Marie G. Jacobsson. The further presentations on "Outcomes of the 32nd International Conference of the Red Cross and Red Crescent Movement", were by Mr. Knut Doermann, Chief Legal Officer and Head of the ICRC Legal Division and on "Interaction between international humanitarian law and the legal framework addressing counter-terrorism", by Mr. Tristan Ferraro, Legal Adviser, ICRC.

[1487] The following persons participated in the Seminar: Mr. Humberto Cantú Rivera (Mexico), Ms. Hua Deng (China), Mr. Martina Filippiová (Czech Republic), Ms. Fong Mian Yi Seraphina (Singapore), Mr. Simon E. Gomez Guaimara (Venezuela), Ms. Sarah Hayes (France), Mr. Etienne Henry (Switzerland), Mr. Alonso Emilio Illueca (Panama), Ms. Fatma Fathy Khalifa (Egypt), Ms. Ayechan Lynn (Myanmar), Mr. Onésime Alain Ndi Bitan (Cameroon), Ms. Nguyen Thi Tuong Van (Vietnam),

355. Mr. Pedro Comissário Afonso, Chairperson of the Commission, opened the Seminar. Mr. Markus Schmidt, Senior Legal Adviser to the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar and served as Director of the International Law Seminar. The University of Geneva ensured the scientific coordination of the Seminar. Mr. Vittorio Mainetti, international law expert from the University of Geneva, acted as coordinator, assisted by Mr. Lorris Beverelli, Ms. Yusra Suedi, Legal assistants, and Ms. Alexandra Borgeaud, intern in the Legal Liaison Office of UNOG.

356. The lectures were given by members of the Commission as follows: Mr. Ernest Petrič, "The Work of the International Law Commission"; Mr. Mathias Forteau, "Selection of new topics by the ILC"; Mr. Dire Tladi, "*Jus cogens*"; Sir Michael Wood, "Identification of customary international law"; Mr. Shinya Murase, "Protection of the atmosphere"; Ms. Concepción Escobar Hernández, "Immunity of State officials from foreign criminal jurisdiction"; Mr. Pavel Šturma, "State succession in relation to State responsibility"; Mr. Georg Nolte, "Subsequent agreements and subsequent practice in relation to treaty interpretation"; Mr. Sean D. Murphy, "Crimes against humanity"; and Ms. Marie Jacobsson, "Protection of the environment in relation to armed conflict".

357. A lecture was given by Mr. Ove Bring, *Emeritus* Professor, Stockholm University and Swedish Defence University and former Principal Legal Adviser on International Law to the Swedish Ministry for Foreign Affairs, on "Legal aspects of cultural heritage disputes: the Parthenon syndrome in international relations".

358. A round table was organized on "Protection of persons in the event of disasters" with the following speakers: Mr. Eduardo Valencia-Ospina, Special Rapporteur on the Protection of persons in the event of disasters; Mr. Giulio Bartolini, Professor, University of "Roma Tre"; Ms. Tessa Kelly, Senior Disaster Law Officer, International Federation of Red Crescent and Red Cross Societies; Mr. Arnold Pronto, Principal Legal Officer, Codification Division, Office of Legal Affairs, United Nations; and Mr. Marco Toscano-Rivalta, Chief, Office of the UN Special Representative of the Secretary-General for Disaster Risk Reduction at United Nations.

359. Seminar participants also attended a workshop organized by the University of Geneva, on the topic: "Sharing of benefits and natural resources in international law". The following speakers made statements: Ms. Danae Azaria, Lecturer, University College of London; Ms. Laurence Boisson de Chazournes, Professor, University of Geneva; Mr. Lucius Caflisch, member of the International Law Commission); Mr. Komlan Sangbana, Researcher, University of Geneva; Ms. Raya Stephan, Consultant, Expert in Water Law, and Ms. Mara Tignino, Senior Lecturer, University of Geneva. They also attended the annual Lalive Lecture at the invitation of the Graduate Institute of International and Development Studies. The lecture on "Choosing between Arbitration and a Permanent Court — Lessons from Inter-State Cases" was given by Sir Michael Wood. The Seminar participants also visited the International Red Cross and Red Crescent Museum, as well as the ICT Discovery of the International Telecommunication Union. They also visited the World Trade Organization and attended a presentation on "WTO Dispute settlement and

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Ms. Irekpitan Okukpon (Nigeria), Ms. Edilen B. Pita Rodriguez (Cuba), Mr. Eric-Aimé Semien (Côte d'Ivoire), Mr. Evgeny Skachkov (Russia), Ms. Oratile Slave (Botswana), Mr. Hidetaka Takeuchi (Japan), Ms. Sosena Tesfamichael Tefera (Ethiopia), Mr. Manasawee Tonyoopaiboon (Thailand), Ms. Maruša Veber (Slovenia), Mr. Giovanny Vega-Barbosa (Colombia). The Selection Committee, chaired by Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva, met on 12 April 2016 and selected 23 candidates out of 92 applications. One selected candidate could not attend the Seminar.

public International law" by Mr. Juan Pablo Moya Hoyos and Mr. Geraldo Vidigal, Legal Affairs Division, WTO.

360. Two Seminar working groups on "Identifying new topics for the International Law Commission" and "Consequences of *Jus cogens* in treaty law beyond invalidity" were organized and Seminar participants were assigned to one of the two groups. Two members of the Commission, Mr. Mathias Forteau and Mr. Dire Tladi, supervised and provided guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants, as well as to the members of the Commission.

361. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Town Hall where the Seminar participants visited the Alabama room and attended a reception.

362. The Chairperson of the Commission, the Director of the International Law Seminar, and Mr. Hamberto Cantù Rivera, on behalf of the Seminar participants, addressed the Commission during the closing ceremony of the Seminar. Each participant was presented with a diploma.

363. The Commission noted with particular appreciation that since 2014 the Governments of Argentina, Austria, Brazil, China, Finland, India, Ireland, Mexico, Switzerland, and the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The *Circolo di diritto internazionale* (CIDIR), a private association for the promotion of international law based in Rome (Italy), also contributed to the Seminar. Though the financial crisis of the last years seriously affected the finances of the Seminar, the situation of the Fund still allowed the granting of a sufficient number of fellowships to deserving candidates, especially from developing countries, in order to achieve adequate geographical distribution of participants. This year, 11 fellowships (8 for travel and living expenses, 2 for living expenses only and 1 for travel expenses only) were granted.

364. Since the inception of the Seminar in 1965, 1,185 participants, representing 171 nationalities, have taken part in the Seminar. Seven hundred twenty-four have received a fellowship.

365. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2017 with as broad participation as possible.

Annexes

A. The settlement of international disputes to which international organizations are parties

Sir Michael Wood

Introduction

1. The present syllabus for a possible topic flows from earlier work of the Commission. It will be recalled that in 2011, the Commission adopted on second reading articles on the responsibility of international organizations,[1] of which the General Assembly has taken note.[2] Already in 2002, the Commission's Working Group on the Responsibility of International Organizations had mentioned "the widely perceived need to improve methods for settling … disputes" concerning the responsibility of international organizations.[3] In 2010 and 2011, the Commission held a general debate on the peaceful settlement of disputes, at which various suggestions for future topics were considered.[4]

2. The proposed topic would be limited to the settlement of disputes to which international organizations are parties.[5] This would include disputes between international organizations and States (both member and non-member States), and disputes between international organizations. It would not cover disputes to which international organizations are not parties, but are involved in some other way. In that sense, dispute settlement under the auspices of an international organization (as in, for example, the United Nation's involvement in a dispute among Member States through measures taken pursuant to Chapter VI of the Charter) would be excluded. Similarly, disputes in which an international organization merely has an interest, such as a dispute among Member States over the interpretation of the organization's constituent instrument[6], would fall outside the topic.

3. The present paper focuses primarily on disputes that are international, in the sense that they arise from a relationship governed by international law. It does not cover disputes involving the staff of international organizations ("international administrative law"). Nor does it cover questions arising out of the immunity of international organizations. It would

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 80-84.

[2] General Assembly resolution 66/100 of 9 December 2011.

[3] *Yearbook of the International Law Commission*, 2002, vol. II (Part Two), p. 96, para. 486.

[4] See the summary records of its plenary meetings on 29 July 2010 and 31 May and 1 June 2011: documents A/CN.4/SR.3070, A/CN.4/SR.3095 and A/CN.4/SR.3096. In 2010 the Commission had before it a Note by the Secretariat on settlement of dispute clauses (document A/CN.4/623), and in 2011 a Working Paper on the peaceful settlement of disputes (document A/CN.4/641).

[5] The term "international organization" is to be understood along the lines of the definition in the draft articles on the responsibility of international organizations (Art. 2 (a): "'international organization' means an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities").

[6] See, e.g., *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, at p. 60, para. 26, where the ICJ noted: "The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity — the Council of ICAO — which one of the parties is impugning and the other defending".

be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered.[7]

4. The question of the possible output of a topic in this field would need careful consideration. It could include proposals for developing existing and new procedures for the settlement of disputes to which international organizations are parties, and/or for model clauses for inclusion in relevant instruments or treaties. In addition, the Commission might wish to review the Manila Declaration on the Peaceful Settlement of International Disputes of 1982,[8] to see how far its provisions might apply to international organizations.

Issues that might be considered within the proposed topic

5. There are some obvious difficulties common to the resolution of all international disputes to which international organizations are parties. These stem from the restricted *access* that international organizations have to the traditional methods of international dispute resolution, as well from barriers to the *admissibility* of claims brought both by and against international organizations. On the other hand, there are policy issues involved in an extension of traditional inter-State dispute settlement mechanisms to international organizations. International organizations are not States.

6. *Access*: There are various obstacles to the submission of disputes to which international organizations are parties to the dispute settlement mechanisms available to States.[9] Most obviously, international organizations may not appear as applicants or respondents in contentious cases before the International Court of Justice, though certain other permanent courts and tribunals established in specific fields are open to them. Arbitration remains an option, but little practice exists to date to guide the procedure and international organizations are rarely bound by jurisdictional clauses. Resort may be had to non-legal methods like mediation, conciliation and enquiry, but, unlike States, international organizations often do not belong to institutions that may facilitate these processes. Member States of the United Nations or a regional organization, for example, may raise their disputes in a political forum so as to settle them with the aid of multilateral political input and procedures such as fact-finding missions. With such barriers to access before third-party dispute resolution mechanisms, the settlement of disputes to which international

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[7] Dispute settlement concerning such matters has to take account of the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement under certain treaties. It is quite common for provision to be made for special procedures, including arbitration, to cover such cases. The Council of Europe's Committee of Legal Advisers on Public international law (CAHDI) has on its agenda an item on 'Settlement of disputes of a private character to which an international organisation is a party' (see Meeting Report of the 50th meeting of CAHDI, Strasbourg, 24-25 September 2015, CAHDI (2015) 23, paras. 23-29). The CAHDI has sought the comments of States on the basis of a questionnaire, which are not yet publicly available (CAHDI (2016) 9 prov.).

[8] General Assembly resolution 37/10 of 15 November 1982.

[9] In principle, it is uncontested that the mechanisms for the peaceful settlement of disputes are open to international organizations (See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, where the Court addressed, among others, the capacity of the United Nations to bring international claims against States). Such mechanisms include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice" (Art. 33 of the UN Charter). See also F. Dopagne, "Les différends opposant l'organisation international à un état ou une autre organisation internationale", in E. Lagrange and J-M. Sorel (eds.), *Droit des Organisations Internationales* (Paris: LGDJ, 2013), pp. 1101-1120, at p. 1109.

organizations are parties relies primarily on negotiation or mechanisms internal to the organization itself.

7. *Admissibility*: Difficulties facing the admissibility of claims by and against international organizations are most prominent in regards to the right of diplomatic protection and the corresponding requirement of the exhaustion of local remedies. Can international organizations, for example, assert the rights of their staff members in a manner analogous to the way that a State may assert the rights of its nationals? Alternatively, does the requirement of exhaustion of local (internal) remedies apply when a State is asserting the right of one of its nationals against an international organization?

(a) *International Court of Justice and other permanent courts and tribunals*

8. Article 34, paragraph 1 of the Statute of the International Court of Justice limits locus standi before the Court to States.[10] Although paragraphs 2 and 3 provide for a certain level of cooperation between the Court and "public international organizations",[11] such organizations are unable to appear as parties in contentious cases. Nevertheless, the United Nations and authorised specialised agencies may seek advisory opinions on legal questions.[12]

9. In light of these limitations in the Statute, the desire to utilise the Court in the settlement of international disputes to which international organizations are parties has manifested itself in two ways: the so-called "binding" advisory opinion, and calls for the amendment of the Statute.

10. Although an advisory opinion as such is non-binding, certain agreements stipulate the use of the advisory opinion procedure to settle disputes with "decisive" effect. A classic example is found in the Convention on the Privileges and Immunities of the United Nations (1946):

> "If a difference arises between the United Nations on the one hand, and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."[13]

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[10] "Only states may be parties in cases before the Court."

[11] "2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings." See also Art. 43, paras. 2 and 3, of the Rules of Court, which were added in 2005.

[12] Art. 96, UN Charter. Specialised agencies, when authorised, may only request advisory opinions on legal questions arising within the scope of their activities.

[13] Art. VIII, Sect. 30, Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, p. 15. See also, e.g., Art. IX, Sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), United Nations, *Treaty Series*, vol. 33, p. 261; Art. X, Sect. 34, Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959), United Nations, *Treaty Series*, vol. 374, p. 147; Art. XI, Sect. 21, Agreement (with exchange of notes) regulating conditions for the operation, in Chile, of Headquarters of the United Nations Economic Commission for Latin America (Santiago, 16 February 1953), United Nations, *Treaty Series*, vol. 314, p. 49; Art. XIII, Sect. 26, Agreement between the United Nations and the Government of Thailand relating to the

11. The Headquarters Agreement between the United Nations and the United States of America envisages a somewhat similar procedure in the context of binding arbitration as provided for in that agreement: either party may ask the General Assembly to request an advisory opinion on a legal question arising in the course of arbitral proceedings, to which the arbitral tribunal will "have ... regard" in rendering its final decision.[14]

12. There are obvious difficulties, however, in using the advisory jurisdiction of the Court for what are in reality contentious matters. Critics of the binding advisory procedure see it as a poor substitute for direct access to the Court by international organizations. The jurisdictional rules applicable to advisory procedures are too permissive. They are, however, also too limiting in other ways that both upset the equality of access among the parties as well as privilege the settlement of certain disputes over others.

13. Both of these undesirable results follow from the fact that only the United Nations and its specialised agencies may request an advisory opinion from the Court.[15] Thus, in a dispute between one of these bodies and a State, only that body will be able to initiate a "claim". Of course, where a treaty obligation requires the submission of a dispute to the advisory procedure, the United Nations or specialised agency would be bound to do so. Even here, however, the relationship among the parties is asymmetrical, as "the question to

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Headquarters of the Economic Commission for Asia and the Far East in Thailand (Geneva, 26 May 1954), United Nations, *Treaty Series*, vol. 260, p. 35; all cited in J. Sztucki, "International Organizations as Parties to Contentious Proceedings before the International Court of Justice?", in A.S. Müller et al. (eds.), *The International Court of Justice: Its Future Role After Fifty Years* (The Hague: Nijhoff, 1977), pp. 141-167, at notes 24-25.

[14] Art. VIII, Sect. 21, Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Lake Success, 26 June1947), United Nations, *Treaty Series*, vol. 11, p. 12:

"(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed on both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."

See also Art. VII, Sect. 31, Agreement between the International Civil Aviation Organization and the Government of Canada regarding the Headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951), United Nations, *Treaty Series*, vol. 96, p. 176.

[15] Art. 65 of the ICJ Statute refers to Art. 96 of the UN Charter: "(a) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. (b) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities." Authorised organs include ECOSOC, the Trusteeship Council and the Interim Committee of the General Assembly. Authorised specialised agencies include the ILO, FAO, UNESCO, WHO, IBRD, IFC, IDA, IMF, ICAO, ITU, IFAD, WMO, IMO, WIPO and UNIDO. The IAEA has also been authorised to request advisory opinions, although it is not a UN specialised agency. See "Organs and Agencies of the United Nations Authorized to Request Advisory Opinions", available at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1 (visited 29 June 2016).

be submitted to the Court is in the hands of a particular organ without the member state concerned [or other party] being able to control the drafting process".[16]

14. Similarly, the fact that only the United Nations and its authorised specialised agencies may request an advisory opinion means that the use of advisory procedures to settle disputes involving an international organization is primarily limited to disputes to which one of those international organizations is a party. Other disputants may of course petition the General Assembly or some other authorised body to request an opinion, but they could not be sure that an opinion would indeed by sought, or in the form desired.[17] As the Commission itself has previously noted, an advisory opinion of this sort would be "imperfect", "uncertain" and "fraught with too many uncertainties for a binding character to be attached to the opinion thus attained".[18]

15. In light of the limitations on the Court's ability to settle disputes to which an international organization is party,[19] over the years a large number of proposals have been put forward to amend the Statute. In 1970, a discussion on the "Review of the Role of the International Court of Justice" took place in the General Assembly, which was followed up by survey including a question on "the possibility of enabling intergovernmental organizations to be parties before the Court". Of the 31 responses to the survey (out of 130 parties to the Statute at the time), fifteen members replied positively to this question (Argentina, Austria, Canada, Cyprus, Denmark, Finland, Guatemala, Iraq, Madagascar, Mexico, New Zealand, Sweden, Switzerland, the UK and the US), and one replied negatively (France).[20] In 1997-1999, the General Assembly's Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization considered proposals by Guatemala[21] and Costa Rica[22] to provide access to the Court to international organizations. Guatemala's proposal was withdrawn in 1999, "its adoption in the foreseeable future [appearing] most unlikely".[23]

16. Quite apart from the political difficulties of amending the Statute, the various proposals have drawn attention to the questions of scope *ratione personae* and *ratione*

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[16] K. Wellens, *Remedies against international organizations* (Cambridge: Cambridge University Press, 2002), at p. 233. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 81, para. 36.

[17] In this regard, see the complex dispute settlement clause in Art. 66.2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

[18] *Yearbook of the International Law Commission*, 1980, vol. 2 (Part Two), pp. 87-88, paras. 9-11; *Yearbook of the International Law Commission*, 1982, vol. 2 (Part Two), p. 65, paras. 4-6. As the previous footnote reveals, States rejected these recommendations to leave advisory procedures out of the dispute settlement clause of what would become the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[19] Considerations of judicial economy have also been cited following the Federal Republic of Yugoslavia's need to bring separate claims against all NATO members, rather than a single claim against NATO, in the *Legality of Use of Force* cases.

[20] *Review of the Role of the International Court of Justice, Report of the Secretary General*, document A/8382 (1971), Question III (a), pp. 6, 70-77, paras 200-224. See also documents A/8382/Add.1, p. 6; A/8382/Add.3, p. 4; A/8382/Add.4, p. 3.

[21] Document A/AC.182/L.95 and Rev.1 (1997).

[22] Document A/AC.182/L.97 (1997).

[23] See Wellens (footnote 16 above), pp. 237-238; Ph. Couvreur, "Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la Cour Internationale de Justice", in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui* (The Hague: Kluwer Law International,1999), pp. 293-323, at pp. 302-322.

materiae that must be addressed in any amendment to the Statute to confer standing before the Court on international organizations.

17. By contrast with the International Court of Justice, certain other permanent courts and tribunals operating under particular treaties are open to international organizations parties to the treaty concerned. This is the case, for example, with the International Tribunal for the Law of the Sea (ITLOS), established by the United Nations Convention on the Law of the Sea of 1982,[24] as well as the Appellate Body of the World Trade Organization.

(b) *International arbitration*

18. Arbitration is potentially a useful tool for the settlement of international disputes to which international organizations are parties. It not only avoids the difficulties of standing that arise before the International Court of Justice, but it also presents the parties with a flexible system that, if needed, can maintain confidentiality.

19. Previous efforts to encourage the use of arbitration to settle disputes involving an international organization date back to the International Law Association's 1964 resolution on international arbitration, which:

> "Draws the attention of all States to the availability of international arbitral tribunals for the settlement of a variety of international disputes, including: (a) International disputes which cannot be submitted to the International Court of Justice … (c) Disputes between States and international organizations."[25]

20. Similarly, the Sixth Committee's Working Group on the United Nations Decade of International Law in 1992 entertained a "proposal urging a wider use of the Permanent Court of Arbitration for the settlement of disputes between States as well as disputes between States and international organizations."[26] The main question that arises is the extent to which international organizations are or indeed can be bound to submit their international disputes with States and other international organizations to arbitration. Unlike with States, there is at present no general treaty open to international organizations under which they could accept the obligation to submit such disputes to arbitration. There is no doubt a number of bilateral agreements containing such clauses. But no general survey exists of arbitration clauses in international agreements to which an international organization is a party, or of arbitration pursuant to such clauses. To date, there seem to be only four arbitrations between an international organization and a State that are in the public domain.[27]

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[24] See Annex IX to the 1982 Convention, art. 7 of which makes special provision for the case where an international organization and one or more of its member States are joint parties to a dispute, or parties in the same interest. The European Union has been a party to one case before the ITLOS Case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union).*

[25] International Law Association, *Resolutions: International Arbitration*, Int'l L. Ass'n Rep. Conf., vol. 52 (1966), p. xii, para. 1.

[26] Document A/C.6/47/L.12 (1992), para 15.

[27] *Tax regime governing pensions paid to retired UNESCO officials residing in France (France - UNESCO)*, UNRIAA, vol. XXV, pp. 231-266; *European Molecular Biology Laboratory (EMBL) v. Federal Republic of Germany*, ILR, vol. 105, pp. 1-74. Another recent case, terminated without an award, was *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)* (PCA Case No. 2014-38) (https://pcacases.com/web/view/109); *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)* (PCA Case No. 2013-30 (https://pcacases.com/web/view/25), under Part XV of the United Nations Convention on the Law of the Sea, also concluded without an award.

21. A related issue is how arbitration clauses are drafted. Current practice is to include an arbitration clause reading as follows:

> "Any dispute between the Parties arising out of, or relating to this Agreement, which is not settled by negotiation or another agreed mode of settlement, shall, at the request of either Party, be submitted to a Tribunal of three arbitrators. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal. If, within thirty days of the request for arbitration, a Party has not appointed an arbitrator, or if, within fifteen days of the appointment of two arbitrators, the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint the arbitrator referred to. The Tribunal shall determine its own procedures, provided that any two arbitrators shall constitute a quorum for all purposes, and all decisions shall require the agreement of any two arbitrators. The expenses of the Tribunal shall be borne by the Parties as assessed by the Tribunal. The arbitral award shall contain a statement of the reasons on which it is based and shall be final and binding on the Parties." [28]

22. Questions could also arise in regards to procedure. Insofar these questions pertain to arbitral rules, however, they have largely been dealt with by the Permanent Court of Arbitration's Optional Rules for Arbitration Involving International Organizations and States (1996). As those rules have been drawn up in light of "the public international law character of disputes involving international organizations and States, and diplomatic practice appropriate to such disputes",[29] there might be little value in the Commission, for example, adapting its Model Rules on Arbitral Procedure of 1958 to disputes involving an international organization.

(c) *Non-legal mechanisms*

23. In keeping with its remedial focus, the International Law Association's *Final Report on Accountability of International Organisations* draws attention to the "preventive potential" of "less formal action by an IO".[30] Accordingly, its recommendations centre, in the first instance, on the creation of standing mechanisms internal to the international organization itself, including ombudsman offices and bodies along the lines of the World Bank Inspection Panel.[31] For present purposes, such mechanisms are likely to be relevant only where a State is exercising diplomatic protection on behalf of its nationals (as to which, see the next section).

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[28] Examples of recent agreements with provisions along these lines include: the 2010 Agreement concerning the establishment of UNISDR office in Incheon; UNICEF Egypt Agreement; 2010 UNDP-Shared Services Centre Agreement: Agreement between the Government of Malaysia and the United Nations Development Programme concerning the establishment of the UNDP global shared service centre (Kuala Lumpur, 24 October 2011), United Nations, *Treaty Series*, vol. 2794. For an earlier form of arbitration clause see, by way of example, Sect. 21 (a) of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 11. For an analysis of the obligation to arbitrate under such earlier clauses, see: *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, I.C.J. Reports 1988*, p. 12; *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 77.

[29] Permanent Court of Arbitration, *Optional Rules for Arbitration involving International Organizations and States* (1996), at p. vii.

[30] International Law Association (Shaw and Wellens, co-rapporteurs), *Final Report on Accountability of International Organisations*, Int'l L. Ass'n Rep. Conf., vol. 71 (2004). p. 164, at p. 224.

[31] *Ibid.*, recommendations 2-5, at pp. 223-224.

24. If the Commission's work focuses on dispute settlement in regards to disputes arising under international law, the relevant non-legal mechanisms will primarily be third-party mechanisms, such as enquiry,[32] mediation and conciliation. The Commission could consider ways of encouraging recourse to such mechanisms. Although they are non-legal in form, these mechanisms may play an important role in settling legal disputes.

(d) *Admissibility of claims: functional protection*

25. The previous sections have dealt with questions regarding access to dispute settlement mechanisms. Even where access exists, however, issues are likely to arise as to how customary rules relating to admissibility of claims apply to international organizations. One particularly problematic area relates to the transferability of customary rules relating to diplomatic protection and exhaustion of local remedies.[33]

26. According to the *Reparation for Injuries* advisory opinion, an international organization has the capacity "to exercise a measure of functional protection of its agents",[34] broadly analogous to the right of a State to exercise diplomatic protection on behalf its nationals. As a result of this analogy, it has been suggested that the requirement of exhaustion of local remedies[35] applies in the context of "functional protection" as it does in the context of diplomatic protection.[36]

27. Yet a closer look shows that the comparison may not be exact. The Court's reasoning in the *Reparation for Injuries* opinion is actually quite different from the rationale underlying diplomatic protection. On the one hand, diplomatic protection derives from a State's "right to ensure, in the person of its subjects, respect for the rules of

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[32] The ILA recommends that an international organization "may consider the establishment of an international commission of inquiry into any matter that has become the subject of serious public concern" (*ibid.*, recommendation 6, at p. 224). It points in particular to the Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (S/1999/1257, annex) and the Report of the Secretary-General pursuant to general Assembly resolution 53/35 into the fall of Srebrenica (A/54/549) (*ibid.*, at p. 226).

[33] Practice prior to 1967 was briefly covered in the *practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat*, document A/CN.4/L.118 and Add.1 and Add.2 (1967), pp. 218-220, paras. 49-56 (in regard to the UN); p. 302, para. 23 (in regard to the specialised agencies).

[34] *Reparation for Injuries Suffered in the Service of the United Nations*, at p. 184. Article 1 of the ILC Draft Articles on Diplomatic Protection, document A/61/10 (2006), defines diplomatic protection as "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."

[35] Articles 14-15 of the Draft Articles on Diplomatic Protection, *ibid.*, define the scope of the exhaustion requirement in the context of diplomatic protection.

[36] See C. Eagleton, "International Organizations and the Law of Responsibility", in *Recueil des Cours*, vol. 76, p. 319, at pp. 351-352; Dopagne (footnote 9 above), at p. 1108; C. Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", *Revue de Droit International, de sciences diplomatiques et politiques*, vol. 57 (1979), p. 81, at pp. 82-83. Eagleton goes so far as to assert that the requirement of exhaustion applies to every claim by the United Nations, even "when it alleges injury against itself by a state" (at p. 352). This derives from the erroneous view that the exhaustion requirement applies also to direct injuries to a foreign State, and not just when a State is exercising diplomatic protection on behalf of a national. Amerasinghe rightly notes that, as for direct injuries to States, "the rule [of exhaustion] would not apply where a direct injury to the organization has been perpetrated". C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge: Cambridge University Press, 2005), at p. 482.

international law".[37] It is a general right that the State holds, deriving from the link of nationality. Functional protection, on the other hand, arises as an implied power of the organization necessary for the fulfilment of the organization's functions.[38] As such, it is a limited power extending only insofar as it is required to allow the agent to perform his or her duties successfully.

28. Another question posed in relation to the exercise of functional protection by an international organization is whether it may be used to bring a claim against the staff member's State of nationality.[39] The distinction between diplomatic protection arising from nationality and functional protection arising from functional considerations might suggest an affirmative answer.[40] In this regard, it should be mentioned that the *Mazilu* and *Cumaraswamy* advisory opinions both concerned disputes between the United Nations and the officials' States of nationality.[41]

29. Different concerns arise when diplomatic protection is asserted against an international organization. In principle, the requirement of exhaustion of local remedies could apply *mutatis mutandis*; in this connection it would be better to speak of internal remedies, rather than local remedies.[42] However, the Institut de Droit international, in a 1971 resolution, expressed a presumption against the requirement for exhaustion in the exercise of diplomatic protection against international organizations.[43] It has been further suggested that the rule is inapplicable, as it derives from the "jurisdictional connection between the individual and the respondent state."[44] An instance where States seem to have exercised their right to diplomatic protection can be found in the 1965 and 1966 settlement agreements between the United Nations and Belgium, Greece, Italy Luxembourg and Switzerland. In those agreements, the United Nations agreed to pay compensation for damages caused by its operations in the Congo to nationals of the concerned States.[45]

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[37] *Mavrommatis Palestine Concessions (Greece v. UK), PCIJ Reports, 1924, Series A. No. 2*, at p. 12.

[38] See *Reparation for Injuries Suffered in the Service of the United Nations*, at pp. 181-184.

[39] *Cf.* Art. 7, Draft Articles on Diplomatic Protection (footnote 34 above): "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim."

[40] See Amerasinghe (footnote 36 above), at pp. 487-488.

[41] See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* (footnote 16 above); *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177.

[42] Jean-Pierre Ritter, 'La protection diplomatique à l'égard d'une organisation internationale', in *Annuaire français de droit international*, vol. 8 (1962), p. 427, at p. 454.

[43] Institut de Droit international (de Vischer, rapporteur), *Les conditions d'application des règles humanitaires relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées* (1971), Art. 8: "Il est également souhaitable que si de tels organismes ont été désignés ou institués par décision obligatoire des Nations Unies ou si la compétence d'organismes semblables a été acceptée par l'Etat dont la victime est un ressortissant, aucune réclamation ne puisse être introduite contre les Nations Unies par cet Etat avant épuisement préalable par la victime du recours qui lui aura ainsi été ouvert."

[44] Amerasinghe (footnote 36 above), at p. 486.

[45] See: Exchange of letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, p. 199; Exchange of letters constituting an agreement between the United Nations and Greece relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966), United Nations, *Treaty Series*, vol. 565, p. 5; Exchange of letters constituting an agreement between the United Nations and Italy relating to the settlement of claims filed against the United Nations in the

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B. Succession of States in respect of State responsibility

Pavel Šturma

Introduction

1. The International Law Commission agreed in 1998 that the selection of topics for the long-term programme of work should be guided by the following criteria: "the topic should reflect the needs of the States in respect of the progressive development and codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification."[1] The proposed topic seems to meet all the criteria.

2. The International Law Commission completed its work on Responsibility of States for internationally wrongful acts in 2001. However, it did not address situations where a succession of States occurs after the commission of a wrongful act. This succession may occur by a responsible State or by an injured State. In both cases, succession gives rise to rather complex legal relationships, and in this regard it is worth noting a certain development in views at the ILC and elsewhere. While in the 1998 report the Special Rapporteur, James Crawford, wrote that there was a widely accepted opinion that a new State generally does not succeed to any State responsibility of the predecessor State,[2] the Commission's commentary to the 2001 Articles reads differently. It says that "in the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory."[3] The development of the practice, case law and doctrinal views from the negative succession rule to its partial rebuttal is succinctly described by J. Crawford.[4]

3. The ILC touched on this problem in the context of its work on State succession in the 1960s. In 1963, Prof. Manfred Lachs, the Chairman of the ILC's Sub-Committee on Succession of States and Governments, proposed including succession in respect of responsibility for torts as one of possible sub-topics to be examined in relation with the work of the ILC on question of succession of States.[5] Because of a divergence of views on its inclusion, the Commission decided to exclude the problem of torts from the scope of the topic.[6] Since that time, however, State practice and doctrinal views have developed.

4. It is a normal and largely successful method for the ILC, after completing one topic, to work on other related subjects from the same area of international law. The ILC took this approach, *inter alia*, in two topics in the field of international responsibility by completing first its Articles on State Responsibility (2001) and then its Articles on Responsibility of International Organizations (2011), and in three topics in the field of succession of States,

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[1] *Yearbook of the International Law Commission*, 1998, Vol. II, Part Two, p. 110.

[2] First Report on State Responsibility (Addendum No. 5), by Mr. James Crawford, 22 July 1998, UN Doc. A/CN.4/490/Add.5, § 282.

[3] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission, Report of the ILC, Fifty-third session, 2001, *Official Records of the General Assembly*, Suppl. No. 10 (A/56/10), p. 119, § 3.

[4] J. Crawford, *State Responsibility. The General Part* (Cambridge: Cambridge University Press, 2013), pp. 435-455.

[5] Report of the Sub-Committee on Succession of States and Governments, *Yearbook…*, 1963, Vol. II, p. 260.

[6] *Yearbook* …, 1963, Vol. II, p. 299.

by completing draft articles for what later became the Vienna Convention on Succession of States in Respect of Treaties (1978) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983), as well as its Articles on Nationality of Natural Persons in relation to the Succession of States (1999).[7] Although the two Vienna Conventions did not receive a high number of ratifications, it does not mean that the rules codified therein did not influence the State practice.[8] On the contrary, in particular the States in Central Europe applied such rules to their own succession.[9] In the same vein, non-binding documents such as Articles on State Responsibility or Articles on Nationality of Natural Persons have been largely followed in practice.

5. In principle, the question of succession in respect of State responsibility arises mainly in certain cases of succession of States, where the State that committed a wrongful act has ceased to exist, namely in cases of dissolution and unification of States. However, other cases, such as secession, may also profit from an in-depth analysis to confirm or to negate three hypotheses. First, the continuing State should, in principle, succeed not only to the relevant primary obligations of the predecessor State but also to its secondary (responsibility) obligations. Second, a newly independent State should benefit from the principle of clean slate (*tabula rasa*), but it could freely accept its succession with respect to State responsibility. Third, in case of a separation (secession), the successor State or States also may assume responsibility, in particular circumstances.

Development of State practice and doctrine in the past

6. Traditionally, neither State practice nor doctrine gave a uniform answer to the question whether and in what circumstances a successor State may be responsible for an internationally wrongful act of its predecessor. In some cases of State practice, however, it is possible to identify division or allocation of responsibility between successor states.

7. Early decisions held that the successor State has no responsibility in international law for the international delicts of its predecessor. In *Robert E. Brown Claim*,[10] the claimant sought compensation for the refusal of local officials of the Boer Republics to issue licenses to exploit a goldfield. The tribunal held that Brown had acquired a property right and that he had been injured by a denial of justice, but this was a delict responsibility that did not devolve on Britain. Similarly, in *Frederick Henry Redward Claim*,[11] the claimants had been wrongfully imprisoned by the Government of the Hawaiian Republic, which was subsequently annexed by the United States. The tribunal held that "legal liability for the wrong has been extinguished" with the disappearance of the Hawaiian Republic. However, if the claim had been reduced to a money judgment, which may be considered a debt, or an

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[7] Text adopted in the annex to the General Assembly resolution 55/153 of 12 December 2000.

[8] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro), Preliminary Exceptions. Judgment of 18 November 2008, ICJ Reports 2008*, para. 109.

[9] E.g. both the Czech Republic and the Slovak Republic made a declaration, when depositing the instruments of ratification of the 1978 Vienna Convention, under Article 7, paras. 2 and 3, that they would apply the Convention to their own succession, which took place before the entry into force of the 1978 Convention. See Status of Treaties as at:15-04-2014. Chapter XXIII: Law of Treaties (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en).

[10] *Robert E. Brown Claim (United States v. Great Britain)*, American & British Claims Arbitration, Claim No. 30; 6 UNRIAA (1923), p. 120.

[11] *Frederick Henry Redward Claim (Great Britain v. United States)*, American & British Claims Arbitration, Claim No. 85; 6 UNRIAA (1925), p. 157, 158.

interest on the part of the claimant in assets of fixed value, there would be an acquired right in the claimant, and an obligation to which the successor State had succeeded.[12]

8. However, with respect to the *Brown* and *Redwards* awards, it has been observed that "These cases date from the age of colonialism when colonial powers resisted any rule that would make them responsible for delicts of states which they regarded as uncivilized. The authority of those cases a century later is doubtful. At least in some cases, it would be unfair to deny the claim of an injured party because the state that committed the wrong was absorbed by another state."[13]

9. The early practice also includes the dissolution of the Union of Colombia (1829-1831) after which the United States invoked the responsibility of the three successor States (Colombia, Ecuador and Venezuela), leading to the conclusion of agreements on compensation for illegal acquisition of American ships. After the independence of India and Pakistan, prior rights and liabilities (including liabilities in respect of an actionable wrong) associated with Great Britain were allocated to the State in which the cause of action arose. Many devolution agreements concluded by the former dependent territories of the United Kingdom also provide for the continuity of delictual responsibility of the new States.[14]

10. Although decisions of arbitral tribunals are not uniform, in *Lighthouses Arbitration* the tribunal found that Greece was liable, as successor State to the Ottoman Empire, for breaches of the concession contract between that Empire and a French company after the union of Crete with Greece in 1913.[15] According to this award, "the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract."[16] Some authors, however, take position that Greece was found liable for its own acts committed both before and after the cession of territory to Greece. The *Lighthouses* decision is also important for its critique of absolutist solutions both for and against succession with respect to responsibility: "It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors."[17]

11. There are also some other cases outside Europe concerning the State responsibility in situations of unification dissolution and secession of States. One example was the United Arab Republic (UAR), created as result of the unification of Egypt and Syria in 1958. There are three examples where the UAR as successor State took over the responsibility for obligations arising from internationally wrongful acts committed by the predecessor States. All these cases involved actions taken by Egypt against Western properties in the context of the nationalization of the Suez Canal in 1956 and the nationalization of foreign-owned properties. The first case deals with the nationalization of the *Société Financière de Suez* by Egypt, which was settled by an agreement between the UAR and the private corporation (1958). In other words, the new State paid compensation to the shareholders for the act

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[12] See D.P. O'Connell, *State Succession in Municipal Law and International Law*, vol. 1 (Cambridge: Cambridge University Press, 1967), pp. 482, 485-486.

[13] Restatement (Third) of the Foreign Relations Law of the United States, § 209; Reporters' Note 7 (1987).

[14] See Materials on Succession of States, UN Doc. ST/LEG/SER.B/14, 1967.

[15] *Lighthouses Arbitration* (*France v. Greece*, 1956), UNRIAA, vol. 12, p. 155. See also ILR, vol. 23, p. 81.

[16] *Ibid.*, p. 92.

[17] *Ibid.*, p. 91.

committed by the predecessor State.[18] Another example is an agreement between the UAR and France resuming cultural, economic and financial relations between the two States (1958). The agreement provided that the UAR, as the successor State, would restore the goods and property of French nationals taken by Egypt and that compensation would be paid for any goods and property not restituted.[19] A similar agreement was also signed in 1959 by the UAR and the United Kingdom.[20]

12. The UAR lasted only until 1961 when Syria left the united State. After the dissolution, Egypt, as one of the two successor States, entered into agreements with other States (e.g. Italy, Sweden, the United Kingdom, the United States) on compensation to foreign nationals whose property had been nationalized by the UAR (the predecessor State) during the period 1958-1961.[21]

13. More complicated situations arise in case of secession. After Panama seceded from Colombia in 1903, Panama refused to be held responsible for damage caused to the US nationals during a fire in the city of Colon in 1855. However, in 1926 the United States and Panama signed the Claims Convention. The treaty envisaged future arbitration proceedings with respect to the consequences of the 1855 fire in Colon, including the question whether, "in case there should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903." Although no arbitration ever took place, this example shows, at least implicitly, that both States had recognized the possibility of succession in respect of State responsibility.[22]

14. Another example relates to the India's independence. Both India and Pakistan became independent States on 15 August 1947. The 1947 Indian Independence (Rights, Property and Liabilities) Order deals issues of succession of States.[23] Section 10 of the Order provides for the "transfer of liabilities for actionable wrong other than breach of contract" from the British Dominion of India to the new independent State of India. In many cases Indian courts have interpreted Section 10 of the Order,[24] finding that India remains responsible for internationally wrongful acts committed before the date of succession.[25]

Cases of succession in Central and Eastern Europe in 1990s

15. More recent cases concern situations of State succession in the second half of the 20th century, some of which gave rise to the question of responsibility. They include in

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[18] See L. Foscaneanu, "L'accord ayant pour objet l'indemnisation de la compagnie de Suez nationalisée par l'Egypte", *AFDI*, 1959, pp. 196.

[19] Accord général entre le gouvernement de la République française et le gouvernement de la République arabe unie, in: *RGDIP*, 1958, p. 738 *et seq.*; *cf.* Ch. Rousseau, Chronique des faits internationaux, *RGDIP*, 1958, p. 681.

[20] Agreement between the Government of the United Kingdom and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt, UNTS, vol. 343, p. 159. *Cf.* E. Cotran "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", *ICLQ*, vol. 8, 1959, p. 366.

[21] See B.H. Weston, R.B. Lillich, D.J. Bederman, *International Claims: Their Settlement by Lump Sum* Agreements (Ardsley, N.Y.: Transnational Publ., 1999), pp. 139, 179, 185, 235. *Cf.* P. Dumberry, *State Succession to International Responsibility* (Leiden: Martinus Nijhoff, 2007), pp. 107-110.

[22] Claims Convention between the United States and Panama (1926), in: UNRIAA, vol. VI, p. 301. *Cf.* P. Dumberry, *op. cit.*, p. 165.

[23] In: M.M. Whiteman, *Digest of International Law*, vol. II (Washington, 1973), p. 873.

[24] Quoted in: D.P. O'Connell, *State Succession ...*, *op. cit.*, vol. I, p. 493.

[25] See P. Dumberry, P., *op. cit.*, p. 173.

particular the cases of succession in the Central and Eastern Europe in 1990s, such as the dissolution of the Czechoslovakia, Yugoslavia and the Soviet Union, as well as the unification of Germany. It is worth noting that according to Opinion No. 9 of the Badinter Commission, the successor States of the SFRY had to settle by way of agreements all issues relating to their succession and to find an equitable outcome based on principles inspired by the Vienna Conventions of 1978 and 1983 and by the relevant rules of customary international law.[26] Some cases also relate to Asia, and, although more rarely, to Africa, where a few cases of succession took place outside the context of decolonization (Eritrea, South Sudan). Relevant findings concerning these developments may be found in the jurisprudence of the International Court of Justice, other judicial bodies, treaties and other State practice.

16. The most important decision may be that of the ICJ in the *Gabčíkovo-Nagymaros* case (Hungary/Slovakia). It is true that the dissolution of Czechoslovakia was based on agreement and even done in conformity with its constitution. Yet both Czech and Slovak national parliaments declared before the dissolution their willingness to assume the rights and obligations arising from the international treaties of the predecessor State.[27] Art. 5 of the Constitutional Act No. 4/1993 even stated that "The Czech Republic took over rights and obligations which had arisen from international law for the Czech and Slovak Federal Republic at the day of its end, except of the obligations related to the territory which had been under the sovereignty of the Czech and Slovak Federal Republic, but not being under the sovereignty of the Czech Republic.[28]

17. The ICJ said concerning international responsibility of Slovakia:

> "Slovakia … may be liable to pay compensation not only for its own wrongful conduct, but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct by Hungary."[29]

Notwithstanding the special agreement between Hungary and Slovakia, the Court thus seems to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts.

18. The issues of State succession after the collapse of the former Yugoslavia were more complex than in the case of Czechoslovakia. One of the reasons was that, in 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) declared itself to be a continuator of the Socialist Federal Republic of Yugoslavia. However, the other former Yugoslav republics did not agree. The UN Security Council and General Assembly also refused to recognize the FRY as continuing State by resolutions of September 1992.[30] The Arbitration Commission (the Badinter Commission) took the same position.[31] Finally, the FRY changed its position in 2000, when it applied for admission to the UN as a new State.[32]

19. On the basis of recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues relating to succession of States by

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[26] The EC Arbitration Commission for the settlement of disputes, Opinion No. 9, 4 July 1992.

[27] See Proclamation of the National Council of the Slovak Republic to Parliaments and Peoples of the World (3 December 1992); Proclamation of the National Council of the Czech Republic to all Parliaments and Nations of the World (17 December 1992).

[28] Constitutional Act No. 4/1993, on Measures relating to the extinction of the CSFR.

[29] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, p. 78 (para. 151).

[30] SC Res. 777 (1992), 19 September 1992; GA Res. 47/1 (1992), 22 September 1992.

[31] The EC Arbitration Commission for the settlement of disputes, Opinion No. 10, 4 July 1992.

[32] GA Res. 55/12 (1 November 2000).

agreement. The Agreement on Succession issues was concluded on 29 June 2001.[33] According to its Preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". It must be pointed out that Article 2 of Annex F of the Agreement deals with the issues of internationally wrongful acts against third States before the date of succession:

> "All claims against the SFRY which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement. The successor States shall inform one another of all such claims against the SFRY."

20. It can be assumed from this text that the obligations of the predecessor State do not simply disappear as a result of the SFRY.[34] In addition, Art. 1 of the Annex F refers to the transfer of claims from the predecessor State to the successor State.[35]

21. The first "Yugoslav" case where the ICJ touched upon the issue of succession in respect of responsibility, though in indirect way, is *Genocide* case (*Bosnia and Herzegovina v. Serbia and Montenegro*). The Court was not called upon to resolve the question of succession but rather to identify the Respondent Party:

> "The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State. … The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. … That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro."[36]

22. The same solution was adopted by the ICJ in the parallel *Genocide* dispute between Croatia and Serbia in 2008.[37] However, this is only the recent final judgment in the case Croatia v. Serbia that dealt more in details with the issues of succession to State responsibility.[38] In spite of the fact that the Court rejected Croatia's claim and Serbia's counter-claim on the basis that the intentional element of genocide (*dolus specialis*) was lacking, the judgment seems to be the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession.

23. The ICJ recalled that, in its Judgment of 18 November 2008, it found that it had jurisdiction to rule on Croatia's claim in respect of acts committed as from 27 April 1992, the date when the Federal Republic of Yugoslavia (FRY) came into existence as a separate

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[33] UNTS, vol. 2262, No. 40296, p. 251.

[34] *Cf.* P. Dumberry, State Succession to International Responsibility (Leiden: Martinus Nijhoff, 2007), p. 121.

[35] "All rights and interests which belonged to the SFRY and which are not otherwise covered by this Agreement (including, but not limited to, patents, trade marks, copyrights, royalties, and claims of and debts due to the SFRY) shall be shared among the successor States, taking into account the proportion for division of SFRY financial assets in Annex C of this Agreement."

[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007*, pp. 75-76 (paras. 74, 77-78).

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro), Preliminary Exceptions. Judgment of 18 November 2008, ICJ Reports 2008*, paras. 23-34.

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015, ICJ Reports 2015.*

State and became party, by succession, to the Genocide Convention, but reserved its decision on its jurisdiction in respect of breaches of the Convention alleged to have been committed before that date. In its 2015 judgment, the Court begins by stating that the FRY could not have been bound by the Genocide Convention before 27 April 1992, even as a State *in statu nascendi*, which was the main argument of Croatia.

24. The Court takes note, however, of an alternative argument relied on by the Applicant during the oral hearing in March 2014, namely that the FRY (and subsequently Serbia) could have succeeded to the responsibility of the SFRY for breaches of the Convention prior to that date. In fact, Croatia advanced two separate grounds on which it claimed the FRY had succeeded to the responsibility of the SFRY. First, it claimed that this succession came about as a result of the application of the principles of general international law regarding State succession.[39] It relied upon the award of the arbitration tribunal in the *Lighthouses Arbitration* (1956), which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make the successor State responsible for the former's wrongdoing.[40] Secondly, Croatia argued that the FRY, by declaration of 27 April 1992, had indicated "not only that it was succeeding to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations".[41]

25. Serbia maintained, in addition to the arguments relating to jurisdiction and admissibility (a new claim introduced by Croatia, no legal basis in Article IX or other provisions of the Genocide Convention), that there was no principle of succession to responsibility in general international law. Quite interestingly, Serbia also maintained that all issues of succession to the rights and obligations of the SFRY were governed by the Agreement on Succession Issues (2001), which lays down a procedure for considering outstanding claims against the SFRY.[42]

26. It is worth mentioning that the Court did not refuse and thus accepted the alternative argument of Croatia as to its jurisdiction over acts prior to 27 April 1992. The ICJ stated that, in order to determine whether Serbia is responsible for violations of the Convention,

> "the Court would need to decide:
>
> (1) whether the acts relied on by Croatia took place; and if they did, whether they were contrary to the Convention;
>
> (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

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[39] *Ibid.*, para. 107.

[40] See the pleadings of Prof. J. Crawford, advocate for Croatia; Public sitting held on Friday 21 March 2014, at 10 a.m., at the Peace Palace, President Tomka presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), CR 2014/21, s. 21, para. 42: "We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either."

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 107.

[42] *Cf.* the pleadings of Prof. A. Zimmermann, advocate for Serbia, who referred to Article 2 of Annex F of the Agreement, which provides for the settlement of disputes by the Standing Joint Committee. Public sitting held on Thursday 27 March 2014, at 3 p.m., CR 2014/22, s. 27, paras. 52-54.

(3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility."[43]

27. It is important to note that the Court considers the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States.[44] However, not all the Judges of the ICJ shared the majority view. As it stays in the Declaration of Judge Xue, "to date, in none of the codified rules of general international law on treaty succession and State responsibility, State succession to responsibility was ever contemplated… Rules of State responsibility in the event of succession remain to be developed."[45]

28. Another interesting case is the investment arbitration *Mytilineos Holdings SA*. In this case, the arbitral tribunal noted that, after the commencement of the dispute, the declaration of independence of Montenegro took place. Although the tribunal was not called upon to decide on legal issues of State succession, it noted that it was undisputed that the Republic of Serbia would continue in the legal status of Serbia and Montenegro on international level.[46]

29. Numerous examples providing evidence of State succession relate to German unification. After re-unification, the Federal Republic of Germany (FRG) assumed the liabilities arising from the delictual responsibility of the former German Democratic Republic (GDR).[47] One of the unsettled issues existing at the time of unification concerned compensation for possessions expropriated in the territory of the former GDR. Except for a few lump sum agreements, the GDR had always refused to pay compensation. It was only in the last period before the unification when the GDR adopted an act on settlement property issues (29 June 1990). In connection with this development the governments of FRG and GDR adopted the Joint declaration on the settlement of outstanding issues of property rights (15 June 1990).[48] According to Section 3 of the Joint declaration, the property confiscated after 1949 should be returned to the original owners. This may be mostly interpreted as the matter of delictual liability (torts) rather than that of State responsibility.

30. However, it is worth noting that the FRG Federal Administrative Court dealt with the issue of State succession in respect of aliens. Although the Court refused to accept the responsibility of the FRG for an internationally wrongful act (expropriation) committed by the GDR against a Dutch citizen, it recognized that the obligations of the former GDR to pay compensation transferred to the successor State.[49]

31. Another example of the transfer of responsibility of the predecessor State to the successor State is the Agreement between the Government of the Federal Republic of Germany and the United States of America concerning the Settlement of Certain Property Claims (1992).[50] This agreement covers claims of the US nationals resulting from

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[43] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 112.

[44] *Ibid.*, para. 115.

[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, Declaration of Judge Xue, para. 23.

[46] *Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia, Partial Award on Jurisdiction* (arbitration under the UNCITRAL Arbitration Rules), Zurich, 8 September 2006, § 158.

[47] Art. 24, Treaty on the Establishment of German Unity, 31 August 1990, ILM, vol. 30, p. 463.

[48] BGBl. 1990, vol. II, s. 1237.

[49] Decision of 1.7.1999, BVerwG 7 B 2.99. *Cf.* P. Dumberry, *op. cit.*, p. 90.

[50] UNTS, vol. 1911, p. 27.

nationalization, expropriation and other measures committed by the GDR between 1949 and 1976.

Views of the doctrine

32. In the past, the doctrine mostly denied the possibility of the transfer of responsibility to the successor State.[51] Later, mostly during the past 20 years, however, the views have evolved, including some nuanced or critical views on the thesis of non-succession, or even admitting succession in certain cases.[52] According to some authors, when the successor State takes over all rights of the predecessor State (such as the case of unification), it should also assume the obligations arising from the internationally wrongful acts. In these cases delictual obligations should be treated as contractual debts.[53]

33. It is worth noting that the issue was treated by the International Law Association (2008)[54] and the Institute of International Law (2013). The lastly mentioned Institute (IDI) has established one of its thematic commissions to deal with the issue.[55] The Tallinn Session of the IDI (2015) finally adopted, on the basis of the Report of the Special Rapporteur (Prof. Marcelo G. Kohen), its Resolution on State Succession in Matters of State Responsibility, consisting of Preamble and 16 articles. The resolution rightly stresses the need for the codification and progressive development in this area.[56] Chapter I consists of two articles, namely Use of terms (Art. 1), building on the terms used in the Vienna Conventions of 1978 and 1983, and Scope of the present Resolution (Art. 2). Chapter II includes common rules applicable to all categories of succession of States (Articles 3 to 10). First, Art. 3 stresses a subsidiary character of the guiding principles. Articles 4 and 5 govern respectively the invocation of responsibility for an internationally wrongful act by or against the predecessor State before the date of succession of States. The common point is the continuing existence of the predecessor State. It reflects a general rule of non-

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[51] *Cf.* e.g. A. Cavaglieri, "Règles générales du droit de la paix", *RCADI*, vol. 26, 1929-I, p. 374, 378, 416 *et seq.*; K. Marek, *Identity and Continuity of States in Public International Law* (Geneva: Librairie Droz, 1968), p. 11, 189; P.M. Eisemann, M. Koskenniemi (Dir.), *State Succession: Codification Tested Against the Facts* (The Hague: Academy of International Law, Martinus Nijhoff Publ., 2000), p. 193-194; C.R. Craven, "The Problem of State Succession and the Identity of States under International Law", *EJIL*, vol. 9, 1998, No. 1, p. 149-150; J. Malenovský, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", *AFDI*, vol. 39, 1993, p. 334; L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A Study of the Tension between Normativity and Power in International Law)* (Leiden: Martinus Nijhoff Publ., 2003), p. 257; J.P. Monnier, "La sucession d'Etats en matière de responsabilité internationale", *AFDI*, vol. 8, 1962, p. 65-90; D.P. O'Connell, *State Succession in Municipal law and International Law.* Vol. I (Cambridge: Cambridge University Press, 1967), p. 482.

[52] *Cf.* e.g. W. Czaplinski, "State Succession and State Responsibility", *Canadian YBIL* 28 (1990), p. 346, 356; M.T. Kaminkga, "State Succession in Respect of Human Rights Treaties", *EJIL*, vol. 7, 1996, No. 4, p. 483; V. Mikulka, "State succession and responsibility", in: J. Crawford, A. Pellet, S. Olleson, *Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 291; P. Dumberry, *State Succession to International Responsibility* (Leiden: Martinus Nijhoff Publ., 2007); D.P. O'Connell, "Recent Problems of State Succession in Relation to New States", *RCADI*, vol. 130, 1970-II, p. 162; B. Stern, "Responsabilité internationale et succession d'Etats". In: L. Boisson de Chazournes, V. Gowland-Debbas, *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff Publ., 2001), p. 336.

[53] W. Czaplinski, "State Succession ...", *op. cit.*, p. 357.

[54] Report of the ILA Conference (2008).

[55] Institut de Droit International, 14th Commission: State Succession in Matters of State Responsibility.

[56] IDI, 2015 Resolution, Preamble, al. 2: "Convinced of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations".

succession if the predecessor State continues to exist. The following article deals with devolution agreements and unilateral declarations. Chapter III (Articles 11 to 16) includes provisions concerning specific categories of succession of States, namely transfer of part of the territory, separation (secession) of parts of a State, merger of States and incorporation of a State into another existing State, dissolution of a State, and emergence of newly independent States.

Right to reparation in case of State succession

34. One of the principal reasons for questioning the thesis of non-succession to State responsibility is the "humanization" of international law which places an emphasis, *inter alia*, on reparation of damage suffered by individuals, whether by way of diplomatic protection or by way of other mechanisms. Therefore, the right to reparation on behalf of individuals should not disappear in the case of cession, dissolution or unification but should be transferred to the successor State.

35. Here the practice seems to be more robust than in the field of transfer of obligations arising from the commission of an internationally wrongful act. Therefore, the ILC was able to adopt, when codifying the Articles on Diplomatic Protection (2006), an exception to the rule of continuing nationality in cases where a natural person had a nationality of a predecessor State (see draft Article 5).[57] Similarly, a modified rule of continuing nationality of corporations was adopted in draft Article 10.[58]

36. The rules codified in the Articles on Diplomatic Protection build on a long history of arbitration and other claims commissions, starting from the period after World War I,[59] which interpreted *inter alia* the rules of the Treaty of Versailles.[60] In modern practice, the most important role belongs to the United Nations Compensation Commission, which addressed to the dissolution of Czechoslovakia, Yugoslavia and the Soviet Union in its decision No. 10 in 1992.[61]

37. The practice of the UNCC clearly shows that the UNCC did not follow the rule of continuing nationality. Instead, for example, it allowed successor States of the former Czechoslovakia to receive compensation on behalf of their new nationals.[62]

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[57] Report of the ILC, Fifty-eighth session, 2006, *Official Records of the General Assembly, Suppl. No. 10* (A/61/10), p. 35: "2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law."

[58] *Ibid.*, p. 55: "1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State …"

[59] *Cf.* e.g. *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, UK – Germany M.A.T., 14 December 1923 and 31 May 1924, Recueil des décisions des tribunaux arbitraux mixtes, vol. IV, p. 233.

[60] Articles 296, 297e and 297h of the Treaty of Versailles.

[61] Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session, 26 June 1992.

[62] Decision Concerning the First Instalment of Claims for Serious Personal Injury or Death (Category B Claims) taken by the Governing Council of the United Nations Compensation Commission at its 43rd meeting, 26 May 1994, Decision No. 20, UNCC Governing Council, UN Doc. S/AC.26/Dec.20 (1994); Decision Concerning the First Instalment of Claims for Departure from Iraq or Kuwait (Category A Claims) taken by the Governing Council of the United Nations Compensation Commission at its 46th meeting, 20 October 1994, Decision No. 22, UNCC Governing Council, UN Doc. S/AC.26/Dec.22 (1994).

38. The rights of individuals are addressed also in very recent agreements relating to the succession of States. For example, the Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters (2012) provides, *inter alia*, in Article 5.1.1 that "each Party agrees to unconditionally and irrevocably cancel and forgive any claims of non-oil related arrears and other non-oil related financial claims outstanding to the other Party …" However, according to Article 5.1.3, "the Parties agree that the provisions of Article 5.1.1 shall not serve as a bar to any private claimants." In addition, under Article 5.1.4, " the Parties agree to take such action as may be necessary, including the establishment of joint committees or any other workable mechanisms, to assist and facilitate the pursuance of claims by nationals or other legal persons of either State to pursue claims in accordance with, subject to the provisions of the applicable laws in each State."

A codification task for the ILC

39. The issue of the succession of States with respect to State responsibility deserves examination by the ILC. This is one of the topics of general international law where customary international law was not well established in the past, therefore the ILC did not include it in its programme at an early stage. Now, it is the time to assess new developments in State practice and jurisprudence. This topic could fulfill gaps that remain after the completion of the codification of succession of States in respect of treaties (Vienna Convention of 1978) and in respect of State property, archives and debts (Vienna Convention, 1983), as well as in respect of nationality (Articles on Nationality of Natural Persons in relation to the Succession of States, 1999), on the one hand, and that of State responsibility on the other hand.

40. The work on the topic should follow the main principles of the succession of States in respect of treaties, concerning the differentiation of transfer of a part of territory, secession, dissolution, unification and creation of a new independent State. A realistic approach, supported by the study of case-law and other State practice, warrants a distinction between cases of dissolution and unification, where the original State has disappeared, and cases of secession where the predecessor State remains. The latter usually pose more problems, as States are far less likely to accept a transfer of State responsibility.[63] It is still important to distinguish between negotiated and contested (revolutionary) secession. Negotiated secession creates better conditions for agreement on all aspects of succession, including in respect of responsibility.

41. However, the work should focus more on secondary rules on State responsibility. It is important to point out that the project aims at both active and passive aspects of responsibility, i.e. the transfer (or devolution) of both obligations of the acting (wrongdoing) State and rights (claims) of injured State. The structure can be as follows: (a) general provisions on State succession, stressing in particular the priority of agreement; (b) residual (subsidiary) principles on transfer of obligations arising from State responsibility; (c) principles on the transfer of rights to reparation; (d) miscellaneous and procedural provisions.

42. One question which deserves further debate and consideration is whether to include the transfer of obligations arising from the responsibility of States to international organizations, including financial institutions. Another question concerns the transfer of obligations from the responsibility of States to individuals. Apart from the issues of diplomatic protection (e.g. exceptions from the continuing nationality rules), which however remain in the State to State relations, it seems that this question may be relevant

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[63] See J. Crawford, *State Responsibility. The General Part* (Cambridge: CUP, 2013), p. 455.

where and to the extent individuals have direct rights against a State. This is a case of certain treaty regimes, such as the European Convention on Human Rights.[64]

43. It is for a debate of the Commission how and when to address the issue. Without prejudice to a future decision, an appropriate form for this topic may be draft articles or principles with commentaries (following, in particular, the precedent of the Articles on State Responsibility and those that later became the Vienna Conventions of 1978 and 1983).

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[64] In this context, see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, [GC], No. 60642/08, judgment, 16 July 2014.

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